MERCHANT MARINE DRUG TESTING

HEARING

BEFORE THE

SUBCOMMITTEE ON MERCHANT MARINE

OF THE

COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON THE COAST GUARD'S PROPOSED RULE TO TEST MERCHANT SEAMEN FOR DRUG AND ALCOHOL USE

SEPTEMBER 22, 1988

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CONTENTS

Page

Statement of:
- Adler, Allan R., Legislative Counsel, American Civil Liberties Union 30
  - Prepared statement 123
- American Maritime Association, submitted by Martin C. Sehan (prepared statement) 204
- Bentley, Hon. Helen Delich, a U.S. Representative from Maryland 6
- Bernstein, Alan D., president, National Association of Passenger Vessel Owners, and general manager, BB Riverboats 41
- Bobb, John K., academic director, Maritime Institute of Technology and Graduate Studies (International Organization of Masters, Mates & Pilots) 55
- Corrado, Ernest J., president, American Institute of Merchant Shipping 37
  - Prepared statement 172
- Farrell, Joseph A., president, American Waterways Operators 39
  - Prepared statement 127
- Grady, Capt. Frederic J., III, USCG, Chief, Merchant Vessel Personnel Division, Office of Marine Safety, Security, and Environmental Protection, Headquarters, U.S. Coast Guard 2
- Havnen, Charles R., vice president and acting executive director, Offshore Marine Service Association 50
  - Prepared statement 188
- Henry, James L., president, Transportation Institute (prepared statement) 237
- Jones, Hon. Walter B., a U.S. Representative from North Carolina, and chairman, Subcommittee on Merchant Marine 1
- Kelly, Edward V., vice president, District 2, Marine Engineers' Beneficial Association 55
- Kolstad, James L., Acting Chairman, National Transportation Safety Board 26
  - Prepared statement 114
- Landgrebe, Karl M., assistant to the president, National Marine Engineers' Beneficial Association 55
- Lassen, Thor J., Government relations representative, National Fisheries Institute 53
  - Prepared statement 192
- Lent, Hon. Norman F., a U.S. Representative from New York 5
- Lewis, Michael R., Washington representative, Inlandboatmen's Union of the Pacific (International Longshoremen's and Warehousemen's Union) 55
- Moulden, John V., special assistant to the Acting Chairman, National Transportation Safety Board 26
- National Marine Engineers' Beneficial Association, the Seafarers International Union of North America, the International Organization of Masters, Mates & Pilots, and the Inlandboatmen's Union of the Pacific (prepared statement) 195
- National Ocean Industries Association (prepared statement) 213
- Pecquex, Frank, legislative director, Seafarers International Union of North America (AFL-CIO) 55
- Person, Bill S., manager of industrial relations, Rowan Companies, Inc., on behalf of the International Association of Drilling Contractors and the National Ocean Industries Association 48
  - Prepared statement 182
- Sanborn, James H., executive vice president of Operations, Maritrans GP, Inc 43
  - Prepared statement 136

Page

Statement of—Continued
- Schneier, Ezra, vice president, Marine Index Bureau, Inc. 47
  - Prepared statement 179
- Silberman, Robert S., Deputy Administrator for Inland Waterways and Great Lakes, Maritime Administration 2
- Vance, B. Wayne, General Counsel, Department of Transportation 2
  - Prepared statement 99
- Verdon, William P., president, United Shipowners of America 40
  - Prepared statement 132

Additional material supplied:
- American Maritime Association:
  - Comments dated August 30, 1988, on notice of proposed rulemaking 206
- American Steamship Company:
  - Employee assistance policy 231
  - Statement of Policy for Chemical Dependency, Abuse, and Employee Assistance 232
- Coast Guard:
  - Accident results on types of vessel 12
  - Excerpt from Federal Register of July 8, 1988, Proposed Rules: "Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel" 75
  - Excerpt from Federal Register of November 21, 1988, Rules and Regulations: "Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel" 241
  - Intoxicants involved in accidents 13
  - Questions submitted by Mr. Jones and answers 106
  - Replies to questions of Mr. Lent 110
  - Replies to questions of Mr. Young 113
- Lake Carriers' Association:
  - Freight agreement between Seafarers International Union, Atlantic, Gulf, and Inland Waters, AFL-CIO; and Great Lakes Association of Marine Operators 234
  - Responses to questions and requests for comments contained in notice of proposed rulemaking 221
  - Summary position on Coast Guard notice of proposed rulemaking 217
- Sanborn, James H.:
  - Comments of Maritrans Operating Partners L.P. on notice of proposed rulemaking dated September 6, 1988 142
- Traffic World:
  - Special Report by Jean V. Murphy dated September 5, 1988, entitled, "Focus: The Drug Testing Dilemma" 66
- Transportation Department:
  - Results of drug tests after accidents 9
  - Statutory authorities for testing 24

Communications submitted:
- Burnett, Jim (NTSB):
  - Letter of September 9, 1988, to Marine Safety Council, U.S. Coast Guard 119
- Cox, Joseph J. (AIMS):
  - Letter of September 6, 1988, to Marine Safety Council, U.S. Coast Guard 175
- Galerne, Andre, (Assn. of Diving Contractors): Letter of September 9, 1988, to Hon. Walter B. Jones 212
- Majority and Minority Staff:
  - Memorandum of September 19, 1988, to Members, Subcommittee on Merchant Marine on oversight hearing 60
- Miller, Rear Adm. F.H. (New York Maritime College): Letter of August 24, 1988, to Marine Safety Council, U.S. Coast Guard 236
- Rufe, Capt. R.T. (Coast Guard):
  - Letter of November 16, 1988, to Hon. Norman F. Lent with answers to questions 109
- Ryan, George J. (Lake Carriers' Assn.):
  - Letter of August 31, 1988, to Marine Safety Council, U.S. Coast Guard with enclosures 218
  - Letter of September 16, 1988, to Hon. Walter B. Jones 216

MERCHANT MARINE DRUG TESTING

THURSDAY SEPTEMBER 22, 1988

House of Representatives,
Subcommittee on Merchant Marine,
Committee on Merchant Marine and Fisheries,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:36 a.m., in room 1334, Longworth House Office Building, Hon. Walter B. Jones (Chairman of the Subcommittee) presiding.

Present: Representatives Jones, Hubbard, Tallon, Pickett, Shumway, Fields, Bateman, Saxton, and Bentley.

Staff present: Subcommittee on Merchant Marine—Cynthia M. Wilkinson, Chief Counsel; Gregory L. Lambert, Counsel; Rudolph V. Cassani, Counsel; Melanie M. Barber, Counsel; Kip Robinson, Minority Counsel; Ann M. Mueller, Subcommittee Clerk. Committee on Merchant Marine and Fisheries—Edmund Welch, Chief Counsel; Gerry Seifert, General Counsel for Maritime Affairs; Mark Aspinwall, Staff Assistant; Rusty Johnston, Minority Counsel; Gwen Lockhart, Chief Minority Clerk.

STATEMENT OF HON. WALTER B. JONES, A U.S. REPRESENTATIVE FROM NORTH CAROLINA, AND CHAIRMAN, SUBCOMMITTEE ON MERCHANT MARINE

Mr. Jones. Today, we are meeting to gather testimony on the Coast Guard's proposed rule to test merchant seamen for drug and alcohol use.

Congress has legitimate concerns over the safety and welfare of merchant mariners, as well as the safety of merchant vessels and the protection of the environment, all of which may be jeopardized by the irresponsible handling of a vessel. We have passed laws that assure that those who operate vessels in violation of accepted standards of behavior will be penalized, and we agree that the use of illegal drugs and the abuse of alcohol exceed the accepted level of behavior in the operation of a vessel.

Today, we are considering a rule proposed by the Coast Guard that, among other things, would require employers to randomly test all personnel who are employed aboard U.S. vessels. In the past, the Congress has sought, and I believe has achieved, a balance between the legitimate right of the public to receive safe transportation services, and the rights of individuals and companies to operate without excessive governmental interference and oversight.

Our purpose in meeting today is to determine whether the right of the public to receive a safe transportation service is not sufficiently protected by the statutory and regulatory regimes now in place. Is there evidence of drug and alcohol use that warrant such a policy change? Should the cost of protecting the public be shifted from the Government to an industry that can ill afford any additional cost burdens? What is the nexus between random testing, for instance, and an identifiable problem that is within the scope of the Secretary's authority to regulate?

This Committee has been involved in the Zero Tolerance debate, and we have strong concerns over the effect that drug policy has on the maritime industry. I believe that an equitable balance must be achieved, and that any change to Federal policy must be made rationally, based on the experience and circumstances of the industry. Moreover, we must make sure that where the Government intrudes into private, commercial activity, there is no question that the most urgent of justifiable public interest requirements demands it.

I would like to note at this time that the Maritime Law Association has expressed its concerns to me about the legal questions surrounding the proposed rule. While they cannot appear here today, they have directed their Maritime Personnel Committee to review and study the rule, and the results of that study will be forwarded to this Committee.

That concludes my statement.

Mr. JONES. Our first witness is the Honorable Wayne Vance, General Counsel, Department of Transportation, accompanied by Mr. Robert S. Silberman, and Capt. Frederic J. Grady, and your prepared statement will be inserted following the oral presentations.

Mr. Vance, you are recognized. You may proceed.

STATEMENT OF HON. B. WAYNE VANCE, GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY ROBERT S. SILBERMAN, DEPUTY ADMINISTRATOR FOR INLAND WATERWAYS AND GREAT LAKES, MARITIME ADMINISTRATION; AND CAPT. FREDERIC J. GRADY III, USCG, CHIEF, MERCHANT VESSEL PERSONNEL DIVISION, OFFICE OF MARINE SAFETY, SECURITY, AND ENVIRONMENTAL PROTECTION, HEADQUARTERS, U.S. COAST GUARD

Mr. VANCE. Thank you, Mr. Chairman.

And, if I may, I'll provide a short version of my statement orally this morning, and then I hope I might have its entirety included in the record.

Mr. JONES. So ordered.

Mr. VANCE. On behalf of Secretary Burnley, I am pleased to be here today to discuss the Coast Guard's notice of proposed rulemaking [NPRM] on the drug testing of merchant mariners. With me today, as you have mentioned, are Capt. Frederic Grady, who is the Chief of the Merchant Vessel Personnel Division of the Coast Guard, and Robert Silberman, Deputy Administrator of the Maritime Administration.

Mr. Chairman, I think that we can all agree that this Nation simply cannot accept a transportation system where the safety of passengers, workers, and the general public is at risk due to drug use by transportation workers. This proposed rulemaking is part of the Department of Transportation's comprehensive program to eliminate substance abuse in the transportation industry. I doubt any reasonable person can disagree with this goal.

The proposed rulemaking was published on July 8 of this year, and the public comment period ended on September 6, 1988. A 60-day comment period was provided for this rule. We needed to move quickly to provide for drug testing programs in the maritime industry, as we have moved to provide for programs in several other industries that we regulate. However, even before the rulemaking was issued, these same issues had been the subject of media attention and were, indeed, raised specifically in five other DOT rulemakings that were made public recently. In addition, notice of these issues was provided in the Department's regulatory program and semiannual agendas. A number of parties have asked for additional time to respond. Although we declined to extend the comment period for the reasons I have just mentioned, we will try to address all comments which are filed late, to the extent it will not delay the rulemaking. The Coast Guard is now reviewing the comments that we have received. At this point in the process, it would be inappropriate and premature to discuss specifically what decisions will be made concerning the final rule.

We all recognize that drug use is a serious national problem. The Department of Transportation is seeking to combat drug use and ensure that the transportation system is as safe as possible. This Department's efforts toward a drug-free transportation system have made us one of the lead agencies in fighting the war on drugs. We have proposed drug testing rules for key personnel in the aviation, rail, mass transit, commercial motor carrier, pipeline, and maritime industries. Except for rail, which already has an anti-drug regulation requiring everything except random testing, the rules would require preemployment, periodic, random, reasonable cause, and post-accident drug testing for employees in defined sensitive safety and security-related positions and would add random testing for all rail employees. All testing would take place under strict Federal guidelines and with respect for the privacy and dignity of the individual. We will make every effort to give employers the flexibility they need in designing company-specific programs.

The Department is also concerned about alcohol abuse and has several final and proposed rules addressing that problem.

The Department is concerned about drug use in the transportation industry for the following reasons. First, the nature of the industry is such that it involves people in positions where they can cause serious harm to others through their actions. Our reliance on the performance of millions of vehicle and vessel operators presents immense potential for unsafe practices. Transportation professionals are responsible for large numbers of passengers and valuables, as well as dangerous, cargoes, often operating highly complex machines traveling at high speeds. Consequently, there is little margin for error in transportation operations. Unlike alcohol, we know little about the precise relationship between the amount or timing of drugs ingested and the levels of impairment. However, we do know that drugs dull the ability to think and to react quickly, both from direct and hangover effects.

There is no evidence that usage by these people in the maritime industry or any of the others we regulate is any less than it is for the general population where usage is significant. We have come to learn that at least 23 million Americans currently use cocaine, marijuana, or other illegal narcotics.

We have all seen, time and again, that drugs mixed with any form of transportation are a deadly combination. The grim statistics from the one industry which now has mandatory, post-accident testing, the rail industry, attest to this. The January 1987 Conrail-Amtrak crash in Chase, Maryland, where a Conrail engineer with drugs in his system rolled through several warning signals into the path of an Amtrak passenger train, was a needless tragedy. Sixteen people died in that crash, and 178 were injured. The National Transportation Safety Board, in its accident investigation report, determined that the probable cause of the accident was the failure, as a result of impairment by marijuana, of the engineer to stop at the signal. Although the link between drug use and accident causation has not been positively determined in all cases, since January 1987, there have been 50 major rail accidents in which one or more key employees tested positive for illegal drug use. Those crashes caused 31 fatalities, 353 injuries, and more than $35 million in property damage. Last year, 65 percent of all train accident fatalities occurred in accidents where at least one employee involved tested positive for drug use.

Railroad employees are not the only transportation workers who are susceptible to drug use and the dangers that come with it. In January, nine people died in a commuter aircraft crash in Durango, Colorado. The pilot of the aircraft had cocaine in his blood. When the Pittsburgh press interviewed emergency room staffs at its area hospitals, 23 cases of airline flight-crew drug abuse were instantly recalled by those who worked there. A dozen cockpit crewmembers and 11 flight attendants were among those treated at hospitals for drug abuse, according to that report. These are people responsible for the lives of hundreds of passengers each day.

To provide the greatest possible assurance that the commercial fleet in this Country has a safe, drug-free work environment for all personnel, the Coast Guard is proposing that an individual may not be employed, including self-employed, on any vessel in a position for which a license, certificate of registry, or merchant mariner's document is required, unless the entire crew is covered by the proposed drug program.

We recognize and are encouraged that some maritime companies already have drug testing programs in place that are working well. Our rules would add features to make the programs better and more complete, such as confirmation testing or random testing.

We recognize that the implementation of a drug testing rule will not be easy, given the nature of the maritime industry. There are inherent difficulties in establishing a program for preemployment testing in an industry where crewmembers are employed only for the voyage and are hired on short notice, often the day the vessel sails. The proposed rules recognize these issues and sought comments on them and many other issues.

We know random testing works. The Coast Guard has had a mandatory random drug testing policy in place for its military personnel since 1983. The program's success in reducing drug usage has been nothing short of remarkable. The percentage of those military personnel testing positive has dropped from over 10 percent when the program began to less than three percent last year. The Coast Guard's experience has shown the deterrent value of random testing.

Among safety sensitive and security-related transportation employees, there is no such thing as a minor drug problem. Any drug use can have disastrous consequences. As this Country's drug-related death toll mounts, the American people are increasingly calling for a tough attitude for those who use and sell drugs. We all must share in the cost and burdens of solving this terrible problem.

This completes my prepared statement, Mr. Chairman. I would be happy, with my colleagues, to respond to any questions that you may have this morning.

[The prepared statement of Mr. Vance can be found at the end of the hearing.]

Mr. JONES. Thank you, Mr. Vance.

Mr. Shumway, do you wish to be recognized?

Mr. SHUMWAY. No, thank you, Mr. Chairman.

Mr. JONES. At this time, I ask unanimous consent to enter into the record the opening statements of our ranking Minority Member, Mr. Lent, and also of Mrs. Bentley.

There being no objection, it is so ordered.

[The statements follow:]

STATEMENT OF HON. NORMAN F. LENT, A U.S. REPRESENTATIVE FROM NEW YORK

Mr. Chairman, this is a very timely hearing on the Coast Guard's proposed regulations concerning the testing of merchant seamen for drug use and alcohol abuse. The House of Representatives this morning will be voting on the omnibus drug legislation which has been under development for several months. The citizens of this country have told their elected representatives that they want to put an end to drugs in the United States. Every individual and industry in this country must recognize that this nation is involved in a war over drugs and we are presently losing the war.

I understand, and can appreciate, that this proposed regulation may have some flaws in it and may not be the most appropriate method of addressing the problem of drug use in the maritime industry. However, I applaud the Department of Transportation for taking the strong stand that it has with regard to drug problems in all of the modes of transportation in our country.

The testimony we will receive today will be helpful to our Committee to better understand the proposed rule and be able to decide whether or not this proposal is adequate. It is important for the government to understand the ramifications of its regulations and how they will affect individuals and businesses.

The safety of our citizens and the safe navigation of vessels operating in our waters dictate that we take every possible measure to ensure that the individuals operating merchant vessels are free of any chemical or other dependency that might affect their abilities to perform their jobs. I am aware of the fact that this proposed regulation only applies to seamen operating on American-flag vessels and—sadly—these vessels represent only a small percentage of the total vessel traffic. It may well be that either through legislation or additional regulations the United States will have to extend our rules governing drug use to all vessels operating in our waters. Obviously, this would provide for total control of drug use on all vessels and would provide maximum assurance of safe operation of merchant shipping within our waters.

Mr. Chairman, I look forward to hearing the testimony of today's witnesses and hope that it will guide us in deciding what action, if any, this Committee might want to take.

STATEMENT BY HON. HELEN DELICH BENTLEY, A U.S. REPRESENTATIVE FROM MARYLAND

Thank you, Mr. Chairman, and thank you, Mr. Lent. I want to commend both of you Gentlemen for calling this oversight hearing today to review the proposed Coast Guard rule for implementing a United States maritime industry drug and alcohol testing program.

No one on this Subcommittee, and I am sure no one in this hearing room, is opposed to the concept and ideals of a drug-free workplace—a drug-free society.

Like many of my Colleagues, I have supported legislation to achieve that goal. In fact, I am one of the relatively few proponents of imposing the death penalty in certain drug-related cases.

Drugs are, without a doubt, a cancer on our society, and we must surgically remove it by any means available to us.

While the war on drugs has been successful in preventing certain shipments of drugs from reaching street vendors, the overall success of the war is doubtful. In fact, I believe it is failing, a fact that is being acknowledged by law enforcement officials throughout the country.

But, eliminating drugs from our society is not just a law enforcement problem—to be addressed solely by our law enforcement organizations. It is a national problem of such magnitude that all of us must now become soldiers in that war on drugs, including the maritime industry.

However, Mr. Chairman, the Coast Guard's proposed rules for implementing a drug testing program within the U.S. maritime industry has raised a lot of concern for a number of reasons.

The Department of Transportation, in its rush to promulgate drug testing rules, has treated the maritime industry in the same fashion and manner as it is treating the airline industry, the trucking industry, and the railroad industry.

Anyone even remotely knowledgeable of the maritime industry realizes that there is a certain uniqueness to it; namely, that the men and women employed in this industry are scattered all around the world.

Implementing a mandatory random drug testing program, assuming that such activity doesn't violate a person's Fourth Amendment rights, imposes a logistical nightmare for operators. Some operators—like those employed in Diego Garcia as part of the Navy's prepositioned forces—have no access to commercial air carriers and infrequent access to government air, a situation that poses a tremendous problem with positive control of the samples in the long trip to a commercial U.S. medical facility.

Mr. Chairman, there are a number of areas of concern regarding the Coast Guard's proposed rules, including a debate over the actual seriousness or depth of the drug problem within the maritime industry to warrant such a costly program.

These areas of concern are well known by the Members present here today, so I won't take up the Subcommittee's time now in outlining them.

I want to assure you, Mr. Chairman, and my other Colleagues that I share your deep concerns regarding the drug epidemic that is racing through our society and that I will work closely with you in developing any policy or legislative approach that will help eradicate this problem—from the maritime industry, from all modes of transportation, and from society itself.

But I want to caution that, in whatever approach that is adopted, in whatever rules that are implemented, there must be reason and a preservation of individual rights—one of the cornerstones of our Constitution.

Thank you, Mr. Chairman.

Mr. JONES. We, of course, have a few questions for you, Mr. Vance.

What are the driving factors behind the length of time the Coast Guard will allow for comments and review of comments?

Mr. VANCE. Well, there is, we feel, an urgency to address the drug use problem in all of the transportation modes. If I may, I would like to take just a second and put into context the kind of time that we have spent specifically on these kinds of things.

In 1987, the then Secretary of the Department of Transportation, Elizabeth Dole, announced that she intended to pursue a program that would do everything that the Department could to ensure that the transportation industry in this Country would be free of drugs. In 1987, we did, indeed, implement a program at the Department of Transportation for testing those DOT employees who are in safety-sensitive positions. That program has been implemented and has been underway for a year. We, during 1987 and 1988, repeatedly said that in the media, publicly, and of course, there was a good deal of Congressional attention, we were determined to do anything that was necessary to rid the transportation industry of any drug problem or drug usage that it might have, to the extent that we could.

In March 1988, we issued the proposed rulemaking for the aviation industry. In May of this year, we issued the proposed rulemaking for the railroad industry. In June, we issued a proposed rulemaking for the highway industry. And, finally, in July of this year, each with a 60-day comment period, we issued proposed rulemakings for the maritime industry, the pipeline industry, and the urban mass transit industry. We have been working for over two years to try to come to resolution of these things, and doing it publicly. We do believe that the 60-day comment period was sufficient, and we have got, Mr. Chairman, a great deal of work to do to conclude these rulemakings.

Mr. JONES. Thank you, Mr. Vance.

In your NPR you state that "Coast Guard data do not specifically identify the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage." You also mention that the data that you do have are sparse and not conclusive. Could you explain that maybe, sir?

Mr. VANCE. Well, specifically regarding——

Mr. JONES. Let me conclude.

Mr. VANCE. Yes.

Mr. JONES. In fact, the examples you cite in your testimony about drug problems in transportation refer to other transportation industries. What, then, is the basis for this rulemaking, and why does it, for this industry, intrude into private and nonpublic business activity?

Mr. VANCE. Mr. Chairman, regarding the information that we do have that we have gathered through the Coast Guard's statistics, we have to recognize that that data is inconclusive because of the nature of the way that the data was gathered over the past few years. Only until recently, and it will be done more under the rulemaking that we have before us, have we begun to gather specific data. In other words, when the Coast Guard investigated an accident in prior years, and this lies behind some of the data here, they were not required to do post-accident testing. The testing that was done, or the conclusions that were reached, was done on the basis of observation, generally, and then only if it seemed apparent that, indeed, alcohol or drugs were involved in the incident.

What we have learned in past years, as we have been looking at this, and what has, frankly, been of great concern, and in some cases appalling, is the degree of drug usage prevalent in this Country. We have looked at each industry and learned more and more about the amount of drug usage, although that amount might be small in some cases. We cannot assume that the presence of drugs in the maritime industry is any different than it would be in the general population, or in other industries about which we know more now such as the aviation industry, or indeed the railroad industry.

Finally, even if we would assume that it would not be a large amount of drug usage, the catastrophic consequences that are possible in the transportation industry are so enormous that we must be absolutely as sure as possible that drugs are not present.

Mr. JONES. Mr. Vance, in other words, you don't have any hard data at all, do you?

Mr. VANCE. We do not have hard data specifically on the maritime industry on the exact amount of drug usage there's been in that industry.

Mr. JONES. In the comments you've received on the proposed rule, how much support is there for the various types of tests and rehabilitation options?

Mr. VANCE. The amount of support has varied with the various types of tests that we have. I think that there has been some. I gather there have been about 320 sets of comments that have been received in this proceeding. Of those generally opposed to drug testing, we believe that there are about 69.

Now, as we break down the categories of the different types of drug testing, and we'll be glad to provide you with the specific numbers as we have them at this point, the numbers vary. There may be more opposing one type and less opposing another. Typically, as it appears looking at the scan of numbers here, if you put together the supports and what we would call conditional support, they support it. But if you make this or that kind of alteration to the proposal, generally the support is larger than the opposition. And, in fact, that's true for every category I see here.

Mr. JONES. Mr. Vance, if you know, how many requests for extension of the comment period did you receive?

Mr. VANCE. I'm sorry?

Mr. JONES. How many requests for an extension of the comment period did you receive?

Mr. VANCE. There were a number of verbal requests at the hearings. We had four hearings, of course, in this comment proceeding. There were 65 written comments requesting additional time. I would have to say that that's not necessarily an unusual number for any comment period in rulemakings that we undertake.

Mr. JONES. Did you receive any requests from Members of Congress?

Mr. VANCE. Yes, we did, Mr. Chairman. We received three, I believe, from Congressman Tauzin, Congresswoman Bentley, Congressman Lowry, and I see here that we may have also received a request from Congressman Miller.

Mr. JONES. Senator Stevens, maybe?

Mr. VANCE. Senator Stevens did. I don't see it here, but I know as a matter of fact that that was one. So Senator Stevens should be included too.

Mr. JONES. Under current regulations, the Coast Guard has the authority to administer alcohol and drug tests at the scene of an accident. What have you learned through that program?

[The following was received:]

Results of Drug Tests After Accidents

The regulation that allows the Coast Guard or marine employer to require chemical tests went into effect in January 1988. Some of the investigative cases that may involve drugs or alcohol have not been completed, and we don't have those. We have conducted a telephone survey of our 10 district offices and determined that chemical testing has occurred in at least seven incidents involving commercial vessels. In one of the incidents an individual tested positive for marijuana; all the other tests were negative. In the one case, the positive test result could not be definitively linked to the cause of the accident in question. These cases are inconclusive as more time and experience with the rule is needed for sufficient data to be collected.

Mr. Vance. I may let Captain Grady answer in more detail, but let me say first, that the current rule allows the employer to test for drugs and alcohol at the scene of an accident. It does not require it. So we can't say that there have been complete statistics from what we have learned there.

Captain, do you have any further information on that?

Captain Grady. Yes, sir.

That rule is relatively new and went into effect January of this year. Some of the investigative cases that may involve drugs have not been completed, and we don't have those. I don't have any figures on how many incidents where drug testing may have been required since January.

We could canvas our field offices and get that information for you, if you'd like.

Mr. Jones. Thank you, Captain.

In December 1987, you issued regulations dealing with drug and alcohol tests. Why are the current regulations inadequate?

Mr. Vance. I think I may have answered this question when I answered your last question. I'm glad Captain Grady gave you some further information.

They are not inadequate, but as I said, the current rules allow for the drug testing in post-accident situations by the employer. The rules that we proposed would require it. They're not inadequate, because by only allowing it, it may well not be done or may not be done by the best method that would be possible in the circumstances. This would give us greater assurance of certainty, and it would give us greater assurance of certainty of the data that we collect.

Mr. Jones. Thank you, Mr. Vance.

Mr. Shumway.

Mr. Shumway. Thank you, Mr. Chairman.

Mr. Vance, I certainly support the current effort to get tough on drugs. And, in fact, as you probably know, we're voting today on a drug bill, and during the consideration of that bill, I have voted for virtually every amendment that would add teeth and strength to the so-called war against drugs.

But there are some aspects of this regulation that trouble me. I wonder how practical it's going to be to put into place, and I wonder what it may do to the maritime industry. We've had a great deal of debate for years in this Committee and in the Administration about the status of our U.S. maritime industry, and, in particular, about the fact that it's really not competitive with industries in other countries around the world.

Here, it seems to me, we're adding another straw to the camel's back; namely, telling them to undergo the expense of drug testing and policing this particular regulation, at a time when their competitors around the world don't have a similar requirement. And it seems that the effect of that would make them even less competitive than they are now. And I think, rather than moving in that direction, we should somehow be finding ways to move in the other direction. And I know that there are cost estimates for the program, and apparently there's some disagreement about how much it may cost. But even if it just costs a nickel, it seems to me we should not be adding to the economic burden of the merchant marine industry, unless there are compelling reasons.

You've given us some examples of areas that come within the Department of Transportation's jurisdiction where drug abuse has led to tragedies. And those examples, as you cited them, dealt with train operators and aircraft pilots. It would seem to me, that the element of risk, the exposure to human life, would be much greater in cases of trains and airplanes than it would be with maritime cargo vessels. Furthermore, a vessel, it seems to me is typically at sea for some days, whereas an airplane pilot, for example, has to make instant decisions. The overall threat that we're trying to address is much, much greater, and therefore this kind of regulation I think would apply with much greater meaning in terms of trains and airplanes than it would maritime vessels.

But let me just ask you a question. I can understand reasons for, perhaps, preemployment testing and post-accident testing and maybe even probable cause testing, but the random testing, seems to pose some practical difficulties. What happens if a ship is at sea for three weeks and the captain orders that random tests of the crew be made and he finds positive results? Does the ship continue on its voyage? Those that are tested positively, are they put in a brig, or are they pushed overboard? What happens to them? And what happens in the case if there's an outbreak of drug abuse in, say, the crew's quarters and a majority of the crew might be testing positive? What does the captain do in that case? What practical remedies does he have?

Mr. VANCE. Well, let me try to address that. In the absence of a rulemaking, which hasn't been completed, so I don't have a rulemaking matrix that I can plug a hypothetical into. But we do recognize that there are, indeed, as with all the industries that we're addressing, but certainly with the maritime industry, and in the kind of circumstances that you have mentioned, practical, logistical problems.

To answer some of the specific questions that you've raised, no, we would not require that the ship return to port, nor would we require brigs or keelhauling, or people being thrown overboard. We would, possibly, and again, the rulemaking has not been completed—we're trying to address these kinds of issues, but we would expect, indeed, that the vessel would continue on its voyage. In fact, we do not envision that the test would be sent, necessarily, to a facility there, but at the time that the ship reaches port. We recognize that in the maritime industry, the seagoing maritime industry where you might be away from a U.S. port beyond 24 hours, that we're going to have to take account of these things, and there may be a lag in time before we're able to address the fact of a positive test result and what to do with this person. But we will, under the rules, eventually be able to address the fact that this person turned up positive.

And let me mention one other aspect of it. We would, though, if a positive test turned up, and as soon as we found out about it, have the person taken from watch. There is a provision in the proposed rulemaking where if it would endanger the crew or the safety of the vessel if the person were removed from that person's duties because they were critical and there were no other choices left to the master of that vessel, it would not be necessary that he be removed. We're trying to address all of these practical problems, and there are quite a lot of them.

Mr. SHUMWAY. Have you addressed the impact of the cost on the industry as a whole, particularly the competitiveness factor? Here we're doing it, others are not doing it. How does that fit?

Mr. VANCE. I very much appreciate your comment that we don't need to add a nickel to the cost. We do think that the cost for the seagoing merchant marine, and all of the parts of the industry over which this cost will be spread, will be small.

We believe, though, that there will be areas where the cost might be reduced as we work out this rulemaking. Let me mention a few of those because what we have done in proposing the rulemaking is that we have assumed the largest inclusion of all of these factors. For instance, we've assumed a level of random testing of 125 percent. I don't know what level of testing we will conclude is necessary. But, if it is less than that, then obviously the cost of that kind of testing is going to go down. And that is a large cost category——

Mr. SHUMWAY. That means, then, that a sailor, then, in 1 year's time would be subject to one and a quarter tests?

Mr. VANCE. It would assume that the number of persons in a unit that would be tested would be tested more than one time by a factor of 25 percent.

But, we may find that it would be sufficient to go below that. And as we go below that, and that testing population is reduced, it will, in a correlated way, reduce the size of costs.

Another is that we've got to look at issues that have been raised about the category of personnel that are tested. While we have initiated the proposal here saying that all people aboard a vessel are critical to safety, is that true for ali vessels? Maybe not for all vessels. If we decide that there are some categories of personnel that do not require testing, then the cost, again, would be less. We are looking at four proposals on rehabilitation. That is, I think, the largest area of cost. Now, we haven't assumed that the cost would be that of the employer. Of those three or four proposals on rehabilitation, all have various areas of cost. If there is no rehabilitation required, then the cost would drop dramatically.

I should also say, that—and I found interesting one summary of comments that I looked at, I think from the drilling industry—that in a 5-year program of drug testing in that industry, they found the time off duty was decreased by 50 percent. Somewhere in here we have also got to add the benefits that there would be from increased productivity. The comments from that particular industry made that possible gain quite clear.

Mr. SHUMWAY. Thank you, Mr. Chairman.

Mr. JONES. Mrs. Bentley.

Mrs. **Bentley**. Thank you, Mr. Chairman.

I did ask for a postponement of the deadline, because I think there is a lot of ground yet to be covered on this. Do we have any instances where there have been trouble with the ships, or accidents where we know, or is there any indication that drugs were involved with the crew?

Mr. **Vance**. I'll let Captain Grady speak specifically to what we may have learned, but as I mentioned earlier, we don't have complete data; there has not been a program or a design in the past to collect complete data. We know that there have been instances where drugs and alcohol may have been involved, but the data is incomplete.

Captain, could you elaborate?

Captain **Grady**. Yes, our statistics show that, between 1981 and 1986, there were 158 casualties in the commercial industry where drugs or alcohol were identified as a possible contributing factor.

Mrs. **Bentley**. That's seven years.

Captain **Grady**. Six.

Mrs. **Bentley**. Six years, and 158 persons. Out of an industry employing how many?

Captain **Grady**. About 30,000.

Mrs. **Bentley**. So you're talking seven times 30,000 is 210,000 people.

Okay, go on.

Captain **Grady**. As pointed out earlier, our investigative procedures really didn't search for evidence of drug or alcohol consumption prior to the casualty as being possible contributing factors. And as it was pointed out, again earlier, in those cases where drug and alcohol was identified, it was most likely in those cases where it was obvious, or an autopsy was performed on the deceased, and it was indicated in the autopsy report. But typically, under our investigative procedures we would start investigating the incident from the time an individual went on watch, or when he first came on duty. We did not necessarily consider what he had been doing the night before, or whether or not there was any evidence that a person used drugs.

We're now looking for that information, but our statistics don't show these figures over the past 6 years in that area.

Mrs. **Bentley**. Were these on ships, on tugboats, on barges, on what?

[The following was received:]

Accident Results on Types of Vessel

In regard to the question on the types of commercial vessels involved, we have studied this issue from the perspective of accident results; i.e., deaths and injuries. This information shows 30 deaths and 4 injuries occurring on fishing vessels; 10 deaths and 2 injuries occurring on towing vessels; 7 deaths and 4 injuries on passenger vessels; 15 deaths and 39 injuries on freight and tank vessels; and 14 deaths and 3 injuries on vessels such as offshore supply vessels, research vessels, and others.

Captain **Grady**. I don't have those figures either. They were on commercial vessels.

Mrs. **Bentley**. Commercial vessels covers a lot of ground.

Captain **Grady**. Yes, it sure does.

Mrs. **Bentley**. I think that would be very important to know. Are they U.S. seamen?

Captain **Grady**. Yes, all United States.

Mrs. **Bentley**. These are all on U.S. vessels?

Captain **Grady**. All on U.S. vessels.

Mrs. **Bentley**. You said drugs and/or alcohol. Which prevailed, would you say?

Captain **Grady**. I don't have that figure. I suspect it was alcohol, but I don't know.

[The following was received:]

INTOXICANTS INVOLVED IN ACCIDENTS

Information concerning the particular type of intoxicant involved; i.e., drugs or alcohol, is not categorized in our accident data base. The vast majority of incidents identified as involving intoxicants are probably alcohol related, because alcohol intoxication is more apparent to individuals investigating casualties that intoxication due to drugs.

Mrs. **Bentley**. I think that's very important. I think that's a very important fact to know whether it's drugs or alcohol, because alcohol has been around the waterfronts of this world for centuries, and it's going to be around the waterfronts of this world for centuries to come. And you and I aren't going to be there to see them. There's nothing that we're going to do to change that. We can add a burden to the American-flag ships. You say $62 million in here. The industry cannot afford it. This industry is sick, not from alcohol. It is just sick financially. And I think we need to look at this very carefully.

Who's going to do the testing out at sea?

Captain **Grady**. The testing at sea, where there would be testing at sea, could be done by the master, except for blood testing. There will not be blood testing done by the master or any person who's not medically qualified to do the test.

Mrs. **Bentley**. Blood testing?

Captain **Grady**. No, there will not be blood testing by the master.

Mrs. **Bentley**. Urine testing?

Captain **Grady**. Urine testing, breath testing. In the situation of a post-accident or casualty, or if the owner or operator of that vessel chooses to do random testing at sea. We expect that urine and breath testing might include random testing at sea.

We are trying to address how best to implement that program, and whether it should or must include at-sea random testing.

Mrs. **Bentley**. Well, I know the complaints that I'm getting from random testing right here in this Country by experienced persons on shore. And ~~the~~ people who are having these tests made, or on whom the tests are being made, resent the invasion of their privacy. And the qualifications of the people doing this are really questionable.

We really don't have, in this Country, available enough qualified people to make the test, the numbers of tests that we're trying to impose upon the public. And I think we need to focus, as Mr. Shumway said, in the public sector where there are passengers involved, more than we need in this other sector where we've had 158 deaths from alcohol in 6 years. And there probably will be 158 deaths from alcohol in the next 6 years, no matter what we do.

That's all, Mr. Chairman. I ask the privilege to submit some questions for further answers.

Mr. JONES. Without objection.

Mr. Fields.

Mr. FIELDS. Thank you, Mr. Chairman.

If I ask a question that's already been asked, I apologize. I missed the first part of the hearing.

But let me try to clear up a question I have. Does this apply strictly to the U.S. merchant marine, or does it also apply to foreign operators?

Mr. VANCE. We cannot apply it to foreign operators, except that we would require post-accident, post-serious incident testing to foreign operators within our jurisdiction.

Mr. FIELDS. Under what authority can you do it in that particular situation?

Mr. VANCE. In that particular situation they're in our jurisdictional waters, so the Coast Guard would have the opportunity and the authority to investigate the accident.

Mr. FIELDS. I guess I don't understand then. If they're in our jurisdictional waters, why couldn't you apply this the rest of the time?

Mr. VANCE. Well, for the same reasons, I suppose, that we couldn't, or wouldn't have applied to us various local laws and customs when we are in other jurisdictional waters. That is basically because on board a vessel the law of the flag would rule, unless it were an incident that effected the local peace and tranquility.

Mr. FIELDS. What percentage of vessels calling at U.S. ports would not be covered by these rules then?

Mr. VANCE. Well, the vessels that we cover are not just seagoing merchant marine vessels. We're covering a lot of passenger-carrying U.S. vessels. We're covering some groups of fishing vessels. We're covering parts of the towing industry.

It's not just the seagoing merchant marine that we're talking about. I would gather that in that context the number of foreign vessels that might be in this Country that wouldn't be subject to the complete panoply of the rule testing categories would be rather small.

Mr. FIELDS. Well, it seems, if I understand, that the thrust of this rule is to promote safety at U.S. ports, and it just appears that there is a huge gap in the thrust of that safety concern if we do not impose the same rule on foreign-flag vessels.

And in addition, we're imposing, as I understand, a $62 million per year cost on our domestic merchant marine, which does have a competitive nexus also.

Mr. VANCE. Again, let me say that the seagoing merchant marine, a part of the industry that we do realize is sick and we are concerned about any additional costs being applied to, is only a part of the categories that we would apply these rules to. Certainly foreign vessels, to the extent that we can, would be covered by the rules. But as I say, we could only do it in post-accident. We would certainly have rules that require, and they are subject to them, that you can't operate the vessels while you're intoxicated. Those kinds of rules will be applied in our jurisdictions. We will seek, and we're doing it in a number of industries, aviation for instance, to have some international rules, some international addressing of this problem of drug use around those industries. We will do it in the maritime industry as well. Unfortunately, we can't apply our rules to all of the foreign carriers, but we will do everything that we can to try to have some international approach taken to the drug usage in all of these trades.

Mr. **Fields**. Well, it would seem to me that that's only fair, from a competitive standpoint, that you impose on those foreign-flag carriers what we're imposing on our domestic merchant marine.

Captain Grady, let me just ask, in regard to our domestic merchant marine, are you going to have the capacity to enforce this regulation?

Captain **Grady**. Well, if this regulation is passed, we will enforce it as we do the many other regulations that we enforce throughout the maritime industry and along the waterfront. We will not have people dedicated to enforcing this, but our law enforcement——

Mr. **Fields**. Do you have the money and the personnel currently available to enforce this rule?

Captain **Grady**. We have personnel available that are enforcing many rules. This would be included among those.

Mr. **Vance**. I'm sorry, I didn't want to break in, but I did want to point out one thing that we're looking at in the rulemaking as an alternative in this area, and that is the idea of self-certification. In other words, we're not going to have the Coast Guard put on additional personnel to drop in on every ship or seaman employer in the Country to be sure that they're doing the testing absolutely correctly day in and out, or that we're going to review, in every case, all of the rules.

We're trying to look at ways that will least impact their resources and most readily get the job done.

I didn't mean to interrupt you, Captain.

Mrs. **Bentley**. Will you yield?

Mr. **Fields**. I'd be glad to yield to the Gentlelady.

Mrs. **Bentley**. I thank the Gentleman for yielding.

On a foreign-flag ship in a U.S. port, a foreign seaman murders the captain. Who has jurisdiction over that crime?

Mr. **Vance**. Well, I've had that described to me in a couple of scenarios. In fact, I have worked some in that area before. If that murder, for instance, were to take place below deck, let's assume it's us in a foreign jurisdiction on one of our vessels. If that murder were to take place, perhaps below deck, not involve any foreign nationals of that jurisdiction where the ship is, then the flag of the vessel would probably prevail. If it were involving an incident, say, above deck in full view of the local community and maybe involved some local national in some way, then it would be more likely that the local jurisdiction's law would attach to it.

Mrs. **Bentley**. So, if the flag of the country prevails, then that means we will have no jurisdiction over the foreign——

Mr. **Vance**. The general rule, and it does have its exceptions and many of the exceptions are based on international comity, is that the law of the flag applies to that vessel. It applies to that vessel in foreign ports, but then there are situations where local law might apply.

Mrs. Bentley. Mr. Fields asked a very pertinent question of Captain Grady, and that is personnel. One of the things that this Committee's been hearing repeatedly over the past year or two is how strapped the Coast Guard is because of limited funding. Now, are you—are we ready to plunge them into something else that they're not going to be able to handle, they're not going to have the personnel? I mean the funds aren't there.

I mean, you know, how are we really going to do this?

Mr. Vance. I think that the approaches that we are looking at, and we're very conscious of resources as we're looking at the various alternatives, will be ways that will least impact the resources of the Coast Guard. I've described one of those, and that's the idea of self-certification. The Coast Guard will not, of course, themselves be doing the testing. The Coast Guard will be most immediately involved in the post-accident kind of testing, where they are involved today, but there will be new procedures, new requirements concerning the post-accident testing that will give us more reliable data and information to work from.

But in the other areas, we're trying to do it in ways that will least impact those resources. We're going to have to depend a great deal on the employers and the operators in the industry to do this policing and enforcing.

Mrs. Bentley. I think one of the most important duties that the Coast Guard has had assigned to it has been the interdiction of drugs coming into this Country. And we have been told repeatedly that they cannot do it because they do not have the funds. Now, if they have the funds for the people, then I think that is what they ought to concentrate on. You have 158 deaths, out of some 200,000, which comes to less than 1 percent, about 0.53 percent, that we're going to impose a $62 million cost on an industry for that.

Thank you, Mr. Fields, for yielding.

Mr. Fields. You're welcome.

Mr. Jones. The Chair desires to declare a recess so we can respond to this vote. We stand in recess.

[Recess.]

Mr. Jones. The Subcommittee will please come to order.

The Chair recognizes the Gentleman from New Jersey, Mr. Saxton.

Mr. Saxton. Thank you, Mr. Chairman. I apologize, Mr. Chairman, for being late this morning. Unfortunately, we had dual markups.

Mr. Jones. Others were late also. I think I was the only one on time.

Mr. Saxton. Mr. Chairman, permit me to ask a question which I think is basic to the entire process. Not knowing a lot about the lives or the work of merchant seamen, and not knowing a lot about, or not having heard a lot about a problem particularly with drugs, I'm just curious to know perhaps what kind of evidence we have, what leads us to believe that there is a very, very significant problem among merchant seamen relative to the use of drugs, and whether or not, therefore, a policy such as this one is really well advised. Is there evidence that there is a major problem that we need to address in this manner?

Mr. **Vance**. Let me answer that by repeating briefly some of the things that I said earlier this morning.

Mr. **Saxton**. Let me apologize to you, as well, because I was late this morning.

Mr. **Vance**. I saw you when you came in.

There is striking evidence of drug use generally in this Country. I believe I mentioned a figure in my prepared statement of some 23 million people who use illegal drugs. What we have found as we have been working on this problem in the transportation industry, especially since Elizabeth Dole gave it such emphasis 2 or 3 years ago, and as we have gathered more data, is that we indeed are correct in assuming that drug usage in the transportation industry, and its population, is no different than it is in the population generally in this Country. Indeed, there is drug usage.

We have had tragic examples of the train crash in Chase, Maryland. We have found drug usage in the aviation industry. We have no reason to believe that drug usage and its patterns would be any different in the merchant marine or in the maritime industry, than it would be in those industries. We do have some data that has been collected in the past years by the Coast Guard indicating that, indeed, alcohol and drugs have been present in some incidents.

Mr. **Saxton**. I'm sorry, could you repeat that sentence?

Mr. **Vance**. That there has been alcohol or drugs present in some incidents, some accidents.

The number of 158 was used this morning. Let me say that that is a very incomplete number and only included times when it was very obvious that that was at issue, was a problem. The kind of catastrophe that can be caused to the transportation industry, and certainly it includes the maritime portion of that industry, it is so great that we must do everything we can, I think, to be sure that in those positions that are safety sensitive that we come as close as we can to having no drug usage.

Mr. **Saxton**. May I direct the same question to Captain Grady, in light of the experience of the Coast Guard?

Mr. **Vance**. Certainly.

Mr. **Saxton**. Do you find many instances where there have been drug usage, and have you come across this as an increasing problem among merchant seamen?

Captain **Grady**. Well, again, as I stated earlier, we don't have hard facts to pin a large number of accidents attributed solely to drugs or alcohol consumption in the maritime industry. There's a tremendous amount, or very high percentage of the casualties that occur in the maritime industry, that are attributed to human error, misjudgment, and things of that nature where people just reacted improperly, and I mentioned earlier, we were not really looking for evidence of drug or alcohol contributing to these in earlier years, other than when someone volunteered, or a witness stated that the individual was obviously drunk.

Drug use is much easier to conceal, and there have been incidents where intoxication has contributed, or been a direct cause of incidents. Although numbers are low, they are there.

Mr. **Saxton**. What I gather from Mr. Vance's statement and from yours, Captain, is that we are then making an assumption that we can transfer data from other groups that have been studied, airline pilots, for example, other transportation modes such as railroad, and we are making the assumption then that there is a significant similar type of a problem in the maritime industry, is that correct?

Captain GRADY. Yes.

Mr. SAXTON. So, based on that assumption, then, we are proceeding to provide the program at a cost of about $62 million to the industry to correct a problem that we assume exists.

Captain GRADY. Yes.

Mr. VANCE. If I may just interject one thing. I want to be careful that I haven't maligned the railroad industry and the aviation industry. Let me say that I'm not saying that there is a prevalence of a drug problem there, but what we have is a situation where even if there is a low amount of usage that we know is present in those kinds of circumstances of the transportation industry, we've got to try to address it.

Mr. SAXTON. May we return for just a minute to Mr. Fields' question relative to foreign-flag ships. I understand from past hearings that something in the neighborhood of 95 percent of the merchant marine traffic into and out of this Country is foreign-flag. And that would leave 5 percent that would be American-flag vessels. Is that approximately correct?

Mr. VANCE. I can't disagree—I would be uncomfortable making that assumption.

Mr. SAXTON. Captain, would you say that's——

Captain GRADY. I agree with that.

Mr. SAXTON. During the break, in discussing Mr. Field's question, and the answer that you gave, it was brought to light that there is a different type of jurisdiction which is available to our Country relative to foreign-flag ships. One type of jurisdiction exists, apparently, when ships are passing through American waters on their way from one foreign port to another foreign port, and a different type of jurisdiction exists for vessels that are inbound to a U.S. port. Is that correct?

Captain GRADY. Well, there's innocent passage, where vessels are free to pass through U.S. waters when they're bound from one port to another port which is not through a U.S. port, and yes, then there are vessels—cases where vessels are navigating our domestic waters in port, and yes, the different rules and laws do apply.

Mr. SAXTON. In the situation of a foreign-flag ship coming into a U.S. port, do we then have the authority to provide the same type of program for foreign-flag ships, the same type of drug testing program?

Captain GRADY. Postcasualty testing, yes. The other, the random testing and screening, no.

Mr. VANCE. Are we talking about a vessel that is incoming to a U.S. port that would expect to come and be in a U.S. port for an extended stay?

Mr. SAXTON. Well, I'm not sure that it makes a lot of difference. Perhaps, within a jurisdictional sense, it might make some difference; but, obviously, if there is a danger based on the use of drugs on American-flag ships, if we make that assumption, then I think it's fair to assume that there's the same danger on foreign-flag ships coming up the estuaries.

Mr. VANCE. And I think your assumption is exactly right in this industry and others.

Mr. SAXTON. And if that's the case, then it would seem to me that, if we are going to impose this program on American-flag ships, then we ought to do everything we can to impose the same program on foreign-flag ships; and if there's a jurisdictional problem, we ought to try to get to the root of it, and provide that same type of a program.

And that was the reason for my question, is there a different type of jurisdiction for ships that are coming into American ports under a foreign flag that would permit us to do that?

Mr. VANCE. I think the point is absolutely well taken. I'm not aware of the circumstances in that incoming vessel that would allow us to do more, but I think the points of the potential dangers, and the rightness of absolute, even application is exactly right.

We have run into the problem of what can we do with foreign entities coming into this Country in the transportation industry, or our vessels or aircraft at other places in the world, in each of our industries. It's not an easy question, and it would perhaps differ a little bit in each industry. But I think your point is exactly right.

Mr. SAXTON. Have you given any thought—different question. Have you given any thought to some type of investigation or study as to the use of drugs on ships?

Mr. VANCE. We will be, by virtue of the data that we will be able to collect more completely in this rule, be able to collect more exact and complete data. We know enough about drug usage and the potential catastrophic results of there being drug usage by people in these kinds of positions that we've got to go ahead. But as we pursue this program we will be collecting more complete data.

Now, we have data from other industries. We have circumstances in the comments that have been provided to us on drug programs that are ongoing in the industry, where they indeed have had positive results; that is, tests that turned out positive. And then, positive results in other ways. And that is that some industries have increased their productivity by the drug programs that they have had in place.

Mr. SAXTON. Mr. Chairman, I don't believe I have any other questions at this point. I just certainly have a concern as to whether or not we have defined adequately the nature of the problem.

It seems to me that when I was a school teacher, I used to teach the kids to first define the problem, and then try to define an answer to the problem. And I think there's a major assumption here that drug use is so prevalent that we need to institute this program. And I think there's a need for a program. I think there's a need to be concerned and perhaps legislate as best we can an answer and a solution to the problem. But based on the testimony I'm not sure that we have adequately defined that problem. And based on my last question, in particular, whether or not we have any evidence, or whether there have been any investigations or studies done other than in isolated incidents when there's been an occurrence and somebody has been found to have been involved with drugs or alcohol. I'd certainly like to see a quick study done before we proceed to look at this program as seriously as they'd like us to.

Mr. JONES. If the Chair is correctly informed, I think the study of railroad transportation and other modes of transportation took anywhere from 12 to 18 months. In this case, in terms of promulgating this rule, it took about three months. Is that one of your concerns?

Mr. SAXTON. Very much. We're talking about a major expense here to the industry; $62 million is the estimate, and as estimates go, perhaps that's accurate, and perhaps it's not. Perhaps it's higher.

Mr. JONES. You can double it, I expect.

Mr. SAXTON. And you and I, and other Members of this Committee have been here around this room ringing our hands for literally years trying to figure out how to make our merchant marine more competitive, and so I think what—and I'm trying to be fair about this—I think what I can conclude here is that we are rushing to judgment on the assumption that the same problem exists in the merchant marine industry that perhaps exists in other industries, and making a major expenditure, not out of our pockets, not out of the U.S. taxpayers' pockets, but out of the industry's pocket. And that concerns me.

Thank you.

Mr. JONES. Mr. Bateman.

Mr. BATEMAN. Thank you, Mr. Chairman. Unfortunately, I did not hear all the statements that have been made, and have not had a chance to peruse them very carefully. So, I'd like to at least, Mr. Chairman, for the record, ask unanimous consent to submit further questions following the hearing should I find that's necessary.

I get the impression from what I have heard and read that we're on some sort of a fast-track procedure to promulgate regulations or proposed regulations for consideration, and then to adopt regulations. How fast is this track, and how does it vary from the norm in terms of promulgation of proposed rulemaking and the actual implementation of a rule?

Mr. VANCE. As to how it might vary from the norm, I think the norm for rulemaking in the Government is probably something that has been more criticized than many other aspects of the operations of the Government. So, I hope it is faster than the norm. The norm may be years.

This was a problem, I think, that we have found to be a serious problem, serious in that persons using drugs in the kinds of positions that we're talking about, whatever part of the transportation industry might be involved, is a serious situation. We've seen some of the consequences of what can happen when that's present. We have been working on this problem in the various parts of the industry, in transportation generally, for quite some time. I think that putting all of the time that we have spent together on this problem in trying to reach a rulemaking, not only in this industry but in five others where we have rulemakings out now, has not been too fast a track. But if we let it go, it will be too slow a track, because it is something that we have got to accomplish and we're working as hard as we can in each of the industries to do it, do it well, with adequate flexibility, with the least necessary cost, but it is something that we feel we must complete.

Mr. BATEMAN. Well, could you tell me specifically the timeframe in which the proposed regulations were promulgated and what period of time was allowed for comment?

Mr. VANCE. When this particular proposal was published on July 8, a 60-day comment period was provided. At that same time, I believe on the same day, a proposed rule was promulgated for the pipeline industry, with a 60-day comment period. A proposed rule was promulgated for the urban mass transit industry of this Country, with a 60-day period.

Mr. BATEMAN. And what is the comment period on the maritime?

Mr. VANCE. Sixty days.

Mr. BATEMAN. Sixty days. And is that the normal comment period?

Mr. VANCE. Comment periods vary with the urgency of the rulemaking, the need to accomplish the purpose, the amount of information that you might have. Probably the most typical rulemaking comment period is 90 days.

Mr. BATEMAN. The next question I have is that there's no question of the fact that we are inundated with a dismal statistic about the increased occurrence of drugs in American society. And it's a very alarming increase, and one that seriously needs to be addressed. We apparently have a concession that there are no specific data with reference to the incidents of drugs in the maritime employment community.

We do have some statistics that I have read very hurriedly about the incidents of accidents and property damage and loss of life and injury in the maritime industry over certain periods of time. I'm curious to know whether or not those figures as to number of accidents, number of casualties, amount of property damage are significantly higher than for periods of time in advance of the increased incidents of the use of drugs in society generally.

Mr. VANCE. I'm afraid I didn't understand perhaps the last part of the question.

Mr. BATEMAN. Somewhere, and I think it's in your statement, there's reference to the number of accidents, marine casualties, injuries for a period 1981 to some date.

Mr. VANCE. Yes, that was mentioned this morning.

Mr. BATEMAN. If you took the previous 5 years, or a 5-year period prior to that time, what would the figures be; much higher, lower, the same?

Mr. VANCE. First, I don't know what the figures would be. I don't know that they would be necessarily different. I'm not sure. But the fact is, even the 158 figure is statistically unreliable as an absolute figure showing drug usage. The 158 figure involved incidents where drug or alcohol use was obvious, it was clear, and the accidents or some part of the cause could be attributed to that. It wasn't based on complete knowledge, nor was it based on complete investigation of all accidents like that.

Mr. BATEMAN. In other words, the casualty/accident-related figures that I read, are they determined to be specifically related to alcohol and drug use?

Mr. VANCE. That's my understanding, yes. Those that I discussed were 158.

Mr. **Bateman**. That isn't the way I understood it, and what is concerning me is that we're proceeding from a premise that drugs in American society are generically a problem; therefore, that problem has got to be reflected necessarily in the merchant marine community without any empirical data that that is, in fact, the case. And I'm bothered by the lack of data that supports that.

No one is going to argue that the use of drugs in American society hasn't increased, and its increased problems, but it doesn't necessarily follow that that problem has been aggravated and exacerbated proportionately in all segments of American activity and the economy. To what extent do your proposed regulations reflect the disparity of activities within the maritime community, from fishing vessels to barge operations, to ultra large crude carriers, container ships, to the extent we've got any left flying the American flag? To what extent do you recognize differences between components within the American merchant marine, and how much fine-tuning goes into this? Is there any regime or protocol that reflects the differences between hiring practices and labor agreements in some aspects of the industry that are not present in other aspects of the industry?

Mr. **Vance**. We have, of course, a proposed rule that we're working on, and working on comments, and working with full recognition of some of the problems that you have raised. They are different logistical problems for different parts of the industry. There are different hiring practices. There are different size components of parts of the industry. Something that might work for a large vessel with a large crew, or work for a vessel with a more permanent crew, might not work as well for a small vessel with a smaller crew. We have raised questions, and the Coast Guard, of course, is intricately familiar with the industry, and these are things that we are trying to address. Certainly, there are questions that we are aware of, and things that we have got to take into account in coming to a final rule.

Mr. **Bateman**. Well, in terms of the proposed rule, however, you've thrown it out there without fine-tuning it, based upon these considerations. And to your credit, I suppose—or not suppose, I'm sure, you're inviting comments that might lead to fine tuning.

Is that a fair characterization of the process?

Mr. **Vance**. Yes, of course.

Mr. **Bateman**. Well, doesn't this argue for a longer period of time within which to receive comments to thoroughly evaluate the basis of the comments before you structure a final rule so that, before you implement something, you can do it with a greater degree of confidence that it is the logical, rational, practical approach for the segment of the industry to which it is tailored?

Mr. **Vance**. We have received over 300 comments. We've had four hearings in different parts of this country. Realizing the difference among the transportation industries, we have a lot of issues that do, indeed, overlap and issues that we have been dealing with for a long time. We have the Coast Guard who is intimately familiar with the industry. We also have a pressing issue. I won't say, and I never intended to malign the maritime industry, no more than we intend to malign the aviation or the railroad industry, that there is a drug prevalence, that there is a drug problem and a large amount of usage.

But we have an issue where the usage, in any amount, in these kinds of positions that we're talking about in these various industries can be so catastrophic in its consequences that we must address it. So, we have got to put things in the balance. The information that we have demonstrates the need to address the issue. And we believe that we have done that. We believe we have had adequate comment and adequate notice, and we've got a great deal of work to do to address the problem in this industry and in the five other industries where we have proposed these kinds of rulemakings.

Mr. BATEMAN. Well, Mr. Chairman, if I still have some time, that leads me to this. You recognize that this is a disparate industry and that all components of it don't act, behave, conduct their affairs the same way. You have some 300 comments on the rule. Can you comment to me to what extent you contemplate the originally promulgated rule is going to be modified or varied to reflect concerns expressed in the comments?

Mr. VANCE. Well, I think there will be some modifications from the rule as proposed. For instance, the cost figure, as I mentioned briefly this morning, was a cost figure based on a rule that included the largest universe in each of the categories that might effect the parameters of cost. I think that there will be some changes in the rule.

I can't say what they're going to be, because we haven't concluded it. But we are looking at things such as, and I'll mention them briefly again, the size of the random sampling requirement. Should it be a high percentage or a lower percentage. We based our estimations on a higher percentage. It might be better for a low. Logistically it may be necessary for a low percentage, recognizing some of the problems that we've heard raised. The categories of personnel that need to be tested. We have assumed in the rulemaking that all people aboard a vessel are safety critical. Perhaps that's not necessarily so. We have raised the issue of rehabilitation and are offering four options. Rehabilitation is the largest cost category in the entire rule, and raises some enormous problems. I'm not sure where we will come out on rehabilitation, but it will be tempered according to the commentary that we have received.

We've raised the issue in the rulemaking of perhaps phasing out some parts of testing requirements as others come into usage. For instance, why have periodic testing if you have random testing. Maybe you phase one out and continue the other that's a greater deterrent. There is some fine-tuning to do, and the comments that we have received will have everything to do with how we come out on this rule.

Mr. BATEMAN. Getting back to the timeframe and the process. If it stays on the original proposed track to adoption of final regulations, when do you contemplate they would be promulgated?

Mr. VANCE. Well, as I've said, there's a great deal of work to be done within DOT. We have other parts of the Administration that we will, as with all rulemakings, have to work with. That process is difficult, if even possible, to estimate with any rulemaking. I hope that we can complete these rulemakings and have them out by the end of this year. I think that that's hopeful, and there's a lot of work to be done to reach that point.

Mr. **Bateman**. Mr. Chairman, that's all I have for now.

Mr. **Jones**. Thank you, Mr. Bateman.

Mr. Tallon, do you have any questions, by any chance?

Mr. **Tallon**. No, thank you, Mr. Chairman, I have none.

Mr. **Jones**. I have one or two, Mr. Vance, if you don't mind.

Is there any reason to believe that drug use on cruise ships is any more or less of a problem than elsewhere in the maritime industry?

Mr. **Vance**. No reason to assume that it's more or less.

Mr. **Jones**. Well, then, is it true that your rule protects only a very few of the thousands of American citizens who go from U.S. ports on cruise ships, because most of these ships are foreign-flag?

Mr. **Vance**. Well, we have, of course, a difficulty if they're foreign-flag. If they're U.S.-flag, they are covered. But we do indeed have the same problem that we would with any foreign vessel in applying our rules to those flag vessels.

Mr. **Jones**. Mr. Vance, is it fair to say that the Department is seeking to use its legal authority to the utmost to deal with the drug abuse in the maritime industry? And if you would, please, describe the Department's authority to issue rules for this purpose.

Mr. **Vance**. Our authority runs from our authority over inspected vessels, in the first case. And it also runs from our authority regarding maritime personnel who are licensed, documented, or certificated.

Mr. **Jones**. Can you perhaps cite specific laws?

Mr. **Vance**. Specific statutory citations?

Mr. **Jones**. Yes.

Mr. **Vance**. We've got 46 U.S.C. 3306, that the Secretary shall prescribe necessary regulations. And that concerns the operation of vessels.

I don't have all the statutory authority in front of me, but it is mentioned in the proposed rulemaking regarding our authority over documented, certificated maritime personnel.

Mr. **Jones**. Would you be willing to submit that for the record?

Mr. **Vance**. Certainly, certainly.

[The following was received:]

STATUTORY AUTHORITIES FOR TESTING

The following statutory authorities are the basis for the proposed Coast Guard rules for chemical drug and alcohol testing of commercial vessel personnel.

PART 4 STATUTORY AUTHORITY (TESTING AFTER SERIOUS MARINE INCIDENTS)

33 U.S.C. 1231.—General authority to regulate under Ports and Waterways Safety Program.

43 U.S.C. 1333.—Additional authority to regulate Mobile Offshore Drilling Units (MODUs) on the Outer Continental Shelf.

46 U.S.C. 2302.—Operating a vessel while intoxicated.

46 U.S.C. 6101.—Marine casualties and reporting. The Secretary shall prescribe regulations on the marine casualties to be reported and the manner of reporting—applies to foreign vessel when involved in a marine casualty on the navigable waters of the U.S.

46 U.S.C. 6301.—Investigation of marine casualties. The Secretary shall prescribe regulations for the immediate investigation of marine casualties under this part to

decide as closely as possible . . . cause of casualty and whether acts of misconduct by licensed, certificated, or documented personnel contributed to cause of casualty.

46 U.S.C. 6305.—Secretary shall prescribe regulations about the form and manner of reports of investigations conducted under this part.

PART 16 STATUTORY AUTHORITY: (CHEMICAL TESTING FOR DANGEROUS DRUGS)

46 U.S.C. 7101.—Issuing and classifying licenses and certificates of registry. Secretary may issue licenses to applicants found qualified as to age, character, habits of life, experience, professional qualifications, and physical fitness (masters, mates, engineers, pilots, operators, radio officers—certificates of registry to pursers, medical doctors, professional nurses).

46 U.S.C. 7301.—General regulatory authority concerning merchant mariner's documents.

46 U.S.C. 7503.—Dangerous drugs as grounds for denial of license, certificate of registry, or merchant mariner's document.

46 U.S.C. 7701.—General authority to prescribe regulations for suspending or revoking licenses, certificates of registry, and merchant mariner's documents and for reissuing same after suspension or revocation.

46 U.S.C. 7704.—Dangerous drugs as grounds for revocation of license, certificate of registry, or merchant mariner's document.

Mr. JONES. Of course, that would relate to drug testing, right?

All right, that concludes this panel, but Mr. Vance, I'd like to perhaps make a statement, an observation.

This Committee wants the maritime industry to be drug-free. And the industry itself wants to be rid of drugs. After all, it's in their own economic interest to do so.

I fear that your rulemaking is likely to fail in accomplishing this goal. It seems to me that there are major gaps in its scope. For instance, you can't touch foreign-flag ships; and, in many of our ports, they account for most of the traffic.

It seems you may not give sufficient weight to the heavy costs to be imposed on the U.S. maritime industry and what that will do to its ability to compete with foreign flags. It seems you are rushing this rulemaking more quickly than you should, and certainly much more quickly than other safety rules issued by the Coast Guard. It seems you are ignoring the lessons learned by private industry in their own drug programs which pre-date yours.

By your own admission, you have very little hard data about the severity of the drug problem in the maritime industry.

And, finally, it seems to me your proposed rule may exceed the legal authority given to you by Federal law. For these reasons, I fear you may be susceptible to a lawsuit challenging these rules. A successful lawsuit would set back everyone's efforts against drugs.

I hope you will not rush into this. Let's have a rule. But let's have one that works and that the industry can live with.

Thank you very much for your appearance here.

Mr. VANCE. Thank you, Mr. Chairman.

Mr. JONES. Mr. Saxton, you would like to be recognized?

Mr. SAXTON. Mr. Chairman, I just wanted to ask unanimous consent to submit additional questions for the record.

[EDITOR'S NOTE.—Additional questions can be found at end of hearing:]

Mr. JONES. Without objection, so ordered.

Mr. Vance, thank you and your staff for being here this morning.

Mr. VANCE. Thank you, Mr. Chairman.

Mr. JONES. The Subcommittee will observe about a 10-minute recess in order to cast a vote, and we'll resume with the next panel upon return.

[Recess.]

Mr. JONES. Our next witness is James Kolstad, Acting Chairman of the National Transportation Safety Board [NTSB], accompanied by Mr. John Moulden, Assistant to the Acting Chairman.

Your prepared statement will be inserted following the oral presentations. You're recognized, Mr. Kolstad. You may proceed.

STATEMENT OF JAMES L. KOLSTAD, ACTING CHAIRMAN, NATIONAL TRANSPORTATION SAFETY BOARD, ACCOMPANIED BY JOHN V. MOULDEN, SPECIAL ASSISTANT TO THE ACTING CHAIRMAN

Mr. KOLSTAD. Thank you very much, Mr. Chairman. It's good to be before the Committee this morning. I would like to recognize Mr. Moulden. Before becoming my special assistant, he was one of the NTSB's drug and alcohol specialists.

Mr. Chairman, like Mr. Vance, I have a long statement that I would like to submit for the record, and a summary statement I'd like to present.

Mr. JONES. Without objection, the long statement will be entered into the record, and a brief statement will be entertained by the Chair.

Mr. KOLSTAD. Mr. Chairman, Members of the Committee, I appreciate this opportunity to appear before you today to discuss the Coast Guard's Notice of Proposed Rulemaking regarding drug and alcohol testing of merchant mariners. I'd like to comment at the outset that the Safety Board believes the Coast Guard's proposed rule to be the most complete and comprehensive of all the modes of transportation.

The Safety Board's continuing concern about the involvement of alcohol and drugs in transportation prompted us to undertake special studies of the various transportation modes. I would like to share with you some of our findings of one such study on recreational boating, and then I will address specifics of the Coast Guard NPRM.

In a study that the Safety Board completed in October of 1983, we found that recreational boating accounts for a surprisingly large number of fatalities. In 1987, for instance, 1,036 people were killed in recreational boating accidents.

Alcohol is involved in a tragically high portion of these accidents and deaths. During the course of our study, we obtained——

Mr. JONES. Mr. Kolstad, may I interrupt just a moment? Will you excuse me?

Mr. KOLSTAD. Certainly.

Mr. JONES. The study to which you refer, I believe, is about five years old, and I'm not sure it's pertinent to this particular testimony, unless you feel otherwise.

Mr. KOLSTAD. It was a 1987 figure, Mr. Chairman, that I just cited. I can proceed without it.

Mr. JONES. Please do if you don't mind.

Mr. KOLSTAD. Studies in two States found that one-third of all people killed in recreational boating accidents had a blood alcohol content of 0.10 percent or higher. In most States this is the legal limit of intoxication.

Although it's clear from our overall study that alcohol plays a major role in boating accidents, information for accurately assessing the full extent of alcohol involvement is insufficient. It's role appears to be seriously understated. The U.S. Coast Guard publishes annual accident data reports, but this information is not complete. Nationally, there are no uniform reporting requirements or guidelines for collecting information on the role of alcohol in recreational boating accidents fatalities or injuries.

In our 1983 study, we noted two particularly significant problems with boating and alcohol use. First, we found that there was little or no information on how alcohol can affect boaters' ability to operate safely. For example, few boaters realize that they are affected by a blood alcohol level of as little as 0.03. Also, very few people understand that there's a tendency to become disoriented in water more than 10 degrees colder than body temperature, and that this tendency is greatly magnified by alcohol. If someone has been drinking and is unexpectedly thrown into the water, the tendency is to swim downward rather than upward to safety.

Second, we found that, although some States make it illegal to operate a boat while intoxicated, few States provide adequate legal tools for enforcement of the law. In most States, there's no defined level of intoxication such as there is for drunk driving. The law does not provide for chemical testing of blood or breath without the operator's consent.

On December 14, 1987, the Coast Guard published its final rule on alcohol involvement in recreational boating. And this rule enables the Coast Guard to enforce the Federal prohibition against boating while intoxicated. That was enacted in 1984.

Now, I'd like to comment specifically on the Coast Guard's July 8th NPRM on drug testing of merchant mariners. With your permission, Mr. Chairman, I'd like to provide, as I mentioned, the complete text for the record.

Mr. JONES. Without objection, so ordered.

Mr. KOLSTAD. The Safety Board—under the section, "Employees Subject to Testing," the Safety Board supports the proposed application of this rule to a broad range of merchant marine personnel. We also recommend that the Coast Guard consider some mechanism for including under the provisions of this rule the shorebased person-in-charge of the loading and unloading of vessels of oil and hazardous chemicals in bulk and their assistants.

The Safety Board also recommends that pilots specifically be included among those marine personnel subject to this rule. State pilots are under the authority of State pilots' commissions and should be subject to State alcohol and drug regulations comparable to this proposed Coast Guard rule. However, Federal pilots are not subject to State commissions and, therefore, should be monitored by the Coast Guard and should meet the requirements of this drug and alcohol rule.

POSTACCIDENT TESTING

The Board believes that the proposed 24-hour time limit for post-accident sample collection is excessive and may contribute to delays in post-accident testing of crewmembers and other individuals who may be involved in an accident. We think the delays in the collection of toxicology specimens can seriously diminish and even invalidate the probative value of drug/alcohol toxicology tests.

The Board recommends that the Coast Guard specify a maximum of a 4-hour limit for the collection of post-accident toxicology samples. Failure to collect a sample within this period should result in an appropriate penalty to the employer and/or employee.

RANDOM TESTING

The Board believes that aggressive reasonable cause testing combined with effective management supervision of employees, post-accident/incident testing, pre-employment testing, periodic testing, and competent drug/alcohol education and treatment are the essential components of an effective anti-drug/alcohol abuse program.

However, should the Coast Guard choose to include random testing in the final rule, the Safety Board would make this point: to be effective, random testing must be performed on a substantial proportion of employees, and on a sufficiently frequent basis to be perceived as a credible deterrent, as the Coast Guard's own testing program now does.

EMPLOYEE PRIVACY

The preamble to the NPRM states a series of questions regarding the circumstances under which test results could be released by an employer to third parties. This rule should be written so that it does not conflict with the Safety Board's statutory authority and responsibility to gather evidence in its accident investigations.

The final rule should clarify that the Board has authority to obtain this evidence in the course of its accident investigation. In this way, employers will not be confused with respect to the authority of the Safety Board in accident investigations. Doing so will alleviate the problem of employer reluctance to release information to the Safety Board.

Questions also are raised with respect to the release of test results to subsequent employers. The Safety Board has not previously addressed this issue with respect to the release of drug test results. However, the Board does believe that a prospective employee's prior job performance should be an important consideration in an employer's hiring decision. Certainly, any prospective employer considering an applicant for a safety-sensitive position in transportation should have access to drug and alcohol test results obtained under this rule.

ALCOHOL TESTING

The Safety Board is pleased that alcohol testing is included in the rule. Additionally, the Safety Board is pleased by the proposal to consider any BAC reading, blood alcohol content reading, above 0.02 percent as a positive test result. The Board has consistently recommended to the Coast Guard and others that the permissible blood alcohol level for commercial transportation operators be reduced below 0.04 percent. Therefore, we view this as an encouraging step toward the adoption of our recommended policy.

Mr. Chairman, that completes my summary, and I'll be pleased to answer any questions you might have.

[The prepared statement of Mr. Kolstad can be found at end of the hearing.]

Mr. JONES. Thank you very much. I have a question or two.

Mr. Kolstad, would you briefly outline some of the procedural problems—like chain of custody—that arise in drug testing and whether the procedures outlined in the proposed regulations adequately deal with these problems?

Mr. KOLSTAD. Well, Mr. Chairman, the Board doesn't view itself as an expert on the subject of laboratory qualifications, but we are pleased to note that the NPRM does call for use of the Department of Health and Human Services [HHS] standards, which provides for accurate and precise testing, and includes such things as blind sample testing and certification of labs performing these tests.

Mr. JONES. Thank you.

Mr. Bateman.

Mr. BATEMAN. Mr. Chairman, the question that comes to me is one that follows up on the last panel, but perhaps you have some information on it.

In that testimony there were references to the number of marine accidents, casualties, property damage that were suspected, or there was reason to believe were alcohol related, but it wasn't—alcohol or drug-related—but it wasn't broken down, as I read the testimony, as to how much was drug related. I wonder if you have any data as to how many of those accidents reported, or noted, involved foreign vessels?

Mr. KOLSTAD. Congressman, we don't have any data on that, and, frankly, the lack of data is one of the problems that we have.

That's one of the reasons we support a rule that would call for post-accident testing and for cause testing as a centerpiece to help get us a better data base than we currently have.

Mr. BATEMAN. Which would include where a foreign vessel was involved, testing of the foreign crews?

Mr. KOLSTAD. Well, I can't speak——

Mr. BATEMAN. The crew of the foreign-flag vessel?

Mr. KOLSTAD. We haven't taken a position on that as a Board, Congressman, but in my opinion, we would support such an addition.

Mr. BATEMAN. Thank you.

Mr. JONES. Mr. Pickett.

Mr. PICKETT. Thank you, Mr. Chairman.

Mr. Kolstad, you mentioned the term "safety-related positions". Has the Board determined who in marine transportation is in a safety-related position, and would this proposed rule apply only to the persons that are in those type of positions?

Mr. KOLSTAD. Congressman, we have not defined—we haven't made a definition of those in safety-sensitive positions. I think the intent would be those responsible for the vessel's operation. Clearly, the navigation, the operation of the engine room, et cetera. Those people who have control of the vessel.

As you notice in my testimony, I also included some shorebased personnel that would be involved in the loading of toxic or hazardous materials.

Mr. PICKETT. Is it your intention that the rule would apply only to the seamen that are in these safety-related positions?

Mr. KOLSTAD. That's correct.

Mr. PICKETT. Thank you, Mr. Chairman.

Mr. JONES. Thank you, Mr. Kolstad, and that concludes your testimony.

Mr. KOLSTAD. Thank you very much.

Mr. JONES. Our next witness is Mr. Allan Adler of the American Civil Liberties Union.

Your prepared statement will be inserted following the oral presentations. Mr. Adler.

STATEMENT OF ALLAN R. ADLER, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. ADLER. Let me first commend you, Mr. Chairman, for holding this hearing. A number of agencies have gone forward with rulemaking on this very controversial issue without having the authorizing or oversight committees of Congress first air the issue to gather a sufficient data base to determine whether or not such programs are justified, whether they're cost effective, and whether, in fact, they are constitutional and otherwise legal. Secondly, I think it's particularly commendable that you are willing to do this at a time when the politicization of the drug issue is such that very few people are willing to stand up in Congress and simply ask these questions about cost effectiveness and propriety.

You've asked me to address how the courts have reacted to similar drug testing programs. Let me say that in the 2 years since President Reagan issued his Executive order requiring Federal civilian employees to undergo drug testing, there are at least some three dozen published court opinions in cases challenging drug testing that has been Government-mandated, either for Government employees or for the employees of industries that are regulated by Government. There are easily several dozen more cases that have not been published. I will try to summarize, very briefly, and fairly, the analysis the courts have used thus far.

Let me say, just to preface this, that we're not talking here about whether drug abuse should be condoned, or whether it is different in any way from the consumption of alcoholic beverages because of the legality of one substance and the illegality of the other. We are simply examining whether this particular means should be available, either as a matter of Government mandate or otherwise, to detect and identify people who are using illegal drugs.

Basically, the courts have taken two approaches to the issue. An overwhelming majority of the courts, mostly the State level and at the lower Federal court level, have held that Government-mandated urinalysis drug testing constitutes an unreasonable search violative of the Fourth Amendment to the Constitution when it is imposed as a condition of employment in the absence of an individualized reasonable suspicion of drug abuse. In these cases, which have involved occupations as diverse as firemen, policemen, school teachers, and recently, the attorneys of the United States Justice Department, the multi-dimensional intrusiveness of drug testing, combined with the test proponent's inability to demonstrate the need for testing on the basis of empirical evidence of a drug problem existing within the group of individuals to be tested, recurs over and over again as the key factors which decisively tip the balance against random testing, mass-scale testing, or post-accident testing on a constitutional basis.

Increasingly, a number of courts pursing this school of thought have begun to focus on the issue of what constitutes "work-related" drug use for purposes of determining the constitutionality of mandatory testing. The courts have uniformly recognized that mandatory drug testing imposed by the Government constitutes a search within the meaning of the Fourth Amendment, and that in order to assess the reasonableness of this particular type of search, based upon workplace concerns, one cannot consider the illegality of the substance at issue. The courts recognize that, when one is considering the dangers of intoxication in terms of safety, productivity, and other adverse impacts it may have in the employment context, it really doesn't matter whether the substance abused is legal or illegal because, just as individuals can consume legal alcoholic beverages and become intoxicated, off-duty, without any adverse impact on their work, some courts have supposed for purposes of Fourth Amendment analysis that the same is true with the consumption of illegal drugs. If the Government is pursuing mandatory urinalysis testing to identify people who use illegal drugs, because of the illegality of such conduct rather than the effect that it has on their conduct in the workplace, it is quite clear that a warrant based upon probable cause would be necessary to obtain such evidence.

On the other hand, there is another body of court decisions, which in the numerical minority but viewed by some people as being more authoritative because they are on the Federal appellate level, which have upheld the reasonableness of government-mandated urinalysis drug testing that is not predicated on any individualized suspicion of drug use. These cases have focused on the court's assessment of the significant safety, security, or law enforcement responsibilities involved in the particular occupations at issue. And they have concluded that the sensitive nature of these duties gives the individuals who occupy those positions a diminished expectation of personal privacy in the face of a heightened Government interest in determining whether they are users of illegal drugs, thus tipping the balance in favor of the proponents of testing even when there is no individualized suspicion of drug use.

Curiously, a number of these cases have relied upon a decision from the United States Court of Appeals for the Third Circuit which applied the Supreme Court's doctrine of an "administrative search" exception to the warrant and probable cause requirements of the Fourth Amendment to uphold a New Jersey State racing commission regulation requiring licensed race horse jockeys to be tested without cause. This case—applying to jockeys who engage in horse racing under State license—has been used to justify testing in the nuclear industry, testing for air traffic controllers, and testing for individuals in other occupations on the grounds that if there was a sufficient public interest to test jockeys without cause, a sufficient public interest must exist in these other professions as well. This line of cases, however, has been roundly criticized because, up until now, the Supreme Court has only applied the "administrative search" exception to the Fourth Amendment in cases involving inspections of commercial property, not searches of individuals, and certainly not searches as intrusive as urinalysis drug testing. In addition, the court has only applied this exception, thus far, to four different situations—the sale of firearms, the sale of liquor, the mining industry, and operation automobile "junkyards," with the Court indicating that these cases alone justified employing this exception to the fourth amendment because the businesses at issue were pervasively regulated in a way that was unique to their circumstances and uncommon to ordinary business enterprise.

Based upon this thumbnail sketch, Mr. Chairman, let me give you the following impressions of the Coast Guard proposal on behalf of the ACLU.

First, as the Coast Guard itself admits, the Government's data are sparse and not conclusive and do not specifically identify the use of drugs or alcohol as a major causal effect in commercial vessel casualties or property damage. What the Coast Guard specifically cites in its rulemaking notice to justify the testing is the assumption that, because there is a drug problem in society, there is also a potential drug problem in the merchant marine industry. The courts have rejected this justification. They have said that arguments such as this are essentially premised on theories of deterrence, and that the value of drug testing for purposes of deterrence must rest on evidence that a drug problem which threatens an identifiable, work-related interest actually exists within the workforce to be tested. It cannot be based upon speculation or surmise.

Second, if the testing is to be justified on the proponent's interest in ensuring the fitness for duty of merchant marine personnel, this rationale, too, does not justify the proposal. Urinalysis drug testing simply cannot provide any present or predictive evidence regarding an individual's impairment on the job. Therefore, it lacks the necessary nexus to the assorted Government interest in imposing drug testing.

Let me quickly read into the record, Mr. Chairman, a brief statement by the Council on Scientific Affairs of the American Medical Association, which in 1986 was adopted by the House of Delegates of the American Medical Association, on the evidentiary value of urinalysis drug testing, and I quote,

> Within the limits of accuracy of the tests that are used, and the administrative security of the program in which these tests are carried out, drug testing only differentiates between persons who have exposed themselves to the drugs being tested for and those who have not. The results do not give any indication of the pattern of drug use, method of administration, frequency of use, time of last use, or amount used. They do not indicate whether the individual abuses or is dependent on a drug, or whether an individual is impaired physically or mentally by the use of the drug.

I submit that under the court cases thus far extant, the evidence that can be obtained through urinalysis would not justify testing on grounds of fitness for duty.

Third, the Coast Guard's effort to turn the testing requirement into one of implied consent is, I believe, disingenuous. It is cynical at best for the Coast Guard to insist that merchant marine personnel, faced with the suspension or revocation of documentation that is concededly necessary to pursue a livelihood in the merchant marine, will be exercising their free will in assenting to testing under the circumstances. The threatened loss of documentation for refusing to be tested is coercion, pure and simple.

Fourth, even if one were to accept the line of cases that have applied the Supreme Court's doctrine of an administrative inspection rationale to justify urinalysis testing, I do not believe that the merchant marine can fairly be characterized as a "pervasively-regulated business" within the meaning of the court's interpretation as applied to the liquor trade, the firearms trade, and the other businesses that I have mentioned.

Beyond these considerations, Mr. Chairman, you and your Colleagues must closely and skeptically examine the figures put forth by the Coast Guard in presenting its approximation of the costs involved in this testing program.

Let me just give you one example for comparison: the Office of Technology Assessment, in testimony on other drug testing programs, focused on what the United States military pays for its drug testing program. The United States military in Fiscal Year 1986 spent $52.5 million on testing, including lab costs, field testing costs, civilian contract lab costs, and specimen shipping costs. These costs, Mr. Chairman, did not include personnel costs. They did not include the cost of rehabilitation programs, and they certainly did not include, as I think would be evident in the implementation of this rule, the cost of litigation and grievance procedures challenging the results of such testing.

I'd be happy to answer any questions that you might have.

[The prepared statement of Mr. Adler can be found at end of hearing.]

Mr. Jones. Thank you, Mr. Adler.

In your opinion, what are the chances of this rule surviving a legal challenge?

Mr. Adler. Well, let me say I think it's almost certain that this rule, if it were to be implemented, would be challenged in court, if not by the ACLU or the labor unions, by some other individual or representative of those who are subject to it. And, based upon the reading of the cases in the majority of decisions, I think that the courts would find this rule to be unconstitutional.

As was recently found by a United States District Court in the District of Columbia in holding the proposed random drug testing of attorneys in the Justice Department to be unconstitutional, the Government simply has not made the case on an empirical data base to demonstrate that there is a drug problem within this workforce that justifies this kind of highly intrusive search of individuals involved. It also has not demonstrated that, as a matter of cost effectiveness, this kind of testing can be satisfactorily related to fitness for duty requirements for persons serving in the merchant marine.

(Editor's note.—On November 29, 1988, Civil Action No. 88-3429 was filed in the United States District Court for the District of Columbia—Transportation Institute and Seafarers International Union of North America, Atlantic, Gulf, Lakes, and Inland Waters District, AFL-CIO and Alvin Robinson and David T. Manzanet v. United States Coast Guard and James H. Burnley IV, Secretary, Department of Transportation.)

Mr. JONES. Why would, in your opinion, DOT propose a rule that most observers believe cannot withstand judicial examination?

Mr. ADLER. Excuse me, sir, I'm sorry I didn't hear the question.

Mr. JONES. Why would DOT propose a rule that most observers feel will not stand up in the courts?

Mr. ADLER. Well, many of the components of the Department of Transportation have thus far proceeded with rulemaking and implementing these programs without going to the Committees of Congress that oversee their statutory responsibilities or authorize their appropriations. I believe that a Committee that has these responsibilities should step in and prevent the implementation of the rule before it's necessary to reach the stage of litigation.

Mr. JONES. Mr. Bateman.

Mr. BATEMAN. You've mentioned the Department of Defense drug testing program in the context of cost. Looking at it from another prospective, it's generally been my understanding that the implementation of the testing program has had significant impact upon the incidence of drug abuse in the military service. Can you confirm or contradict that conclusion?

Mr. ADLER. Sir, I have no way of confirming or refuting the statistics. But assuming that the statistics are valid and that, in fact, the incidence of positive tests have greatly gone down, I think you have to understand, first of all, that in the first 3 years of the Pentagon's testing program they had terrible problems in terms of the accuracy and the validity of test results. A commission of the Pentagon, known as the Einsel Commission because of Major General Einsel's leadership, indicated that the laboratories then doing the tests were not equipped, either in terms of the qualifications of their people or in terms of quality control programs, to do the tests properly. And as a result of this, in 1983 and 1985, several thousand cases of disciplinary actions in the military had to be reversed or otherwise discounted because of the inability to demonstrate the forensic reliability of the testing.

The second point I would make is that, while the military appears to have cleaned its up act in this area, that's because it is now using its own laboratories devoted exclusively to drug testing, and are not using commercial laboratories very much at all. The military is also a rather unique society, and it's one that I don't think, in terms of its experience in this area, just as in its experience of other areas of enforcing laws and regulations, can be applied to the civilian sector, and certainly cannot be applied to a commercial enterprise in any meaningfully adaptable way.

Mr. BATEMAN. One of the things said early this morning, and I think you alluded to it also, is that the proposed regulations proceed on a presumption that, because there is a wide incidence of drug abuse in the general population, it must also be present in the merchant marine population. It occurs to me that given the fact that drug use is certainly not exclusively, but largely centered in the younger elements of the population. And the merchant marine segment of the population is very substantially older. This would seem to belie that there is a reasonable relationship that would support the presumption which is the premise of the regulation. Would you like to comment on that?

Mr. Adler. Well, I would suggest that argument was made in a slightly different way by the General Accounting Office in assessing the population that would be subject to President Reagan's Federal civilian employee drug testing program. The GAO indicated in that case that a vast number of civilian employees of the Federal Government were beyond the age range of regular drug use and, therefore, the testing would not make much sense. In any event, I think either case demonstrates that, when you're construing Fourth Amendment law in this area, you simply cannot use this kind of speculation to justify this kind of intrusive search.

Le~~t me~~ point out that in 1986, when these programs began to get underway, the Administration argued in court that this kind of testing did not amount to a search under the Fourth Amendment, and that, even if it did, it was permissible because it was implemented as a condition of employment rather than as an investigative search in a criminal context. Both of those arguments have been flatly rejected by the courts. They have said that individuals in a civilian context, and even in cases where the search is imposed by the Government as a condition of employment, are entitled to their Fourth Amendment rights. Under Fourth Amendment doctrine, you simply must have a better reason, based upon evidence, to impose this kind of intrusive search.

Mr. Bateman. If you would, comment for me on whether or not legalistically there is a distinction legitimately drawn between a private employer, who at its own initiative, implements a drug screening program for prospective employees or employees already on its workforce, as opposed to a governmentally mandated program?

Mr. Adler. Well, you're absolutely right, Mr. Bateman. It's a rather ironic distinction that the law makes. If the drug testing requirement is Government mandated, and again this means if the Government requires drug testing for its own employees, or if it requires private employers to test their employees, then you have a Fourth Amendment search issue and the question is, under all the circumstances, whether or not implementing this kind of search is reasonable.

If private employers, on their own initiative, impose drug testing requirements on their employees, you have no constitutional issue whatsoever. But as a matter of policy, there's another important distinction to remember. Although private employees could not then have recourse to a constitutional challenge, you also have the certainty that the implementation of the program is not going to be subject to the kind of rigorous accountability, oversight, and enforcement that it would be if it were required and mandated by Government. And the result is, that when the Government imposes these requirements on private sector employers, the employers may not like the cost, they may not like the administrative burdens, but they know that somebody will be looking over their shoulders to see whether, in fact, they have implemented the program in a way that has some integrity to it. If the program is left to private employers to implement on their own, precisely because they do not like the costs and do not like the administrative burden, it is highly doubtful that the program will be one of integrity, accuracy, and reliability and, therefore, it would be self-defeating in terms of the purpose for which it is initiated.

Mr. **Bateman**. Well, bearing in mind that the problem of drug abuse in American society is real and it's genuine, and also bearing in mind our constitutional requirements, do you see any validity to a notion that, rather than mandating this kind of program as a Government fiat, that we should take the approach of providing incentives or encouragement to private employers to conduct drug screening programs?

Mr. **Adler**. Well, I think in terms of drug screening through urinalysis, you are at a classic rock and a hard place situation. Because of the distinction that I've just laid out to you, I would not want to see the Government decide that this was entirely a matter to be left in the hands of private employers, because I think the rights of individuals in that case would be just as subject to being abused, if not more so, than if the Government was overseeing responsible implementation of the program.

What I would urge is for Congress, and the people on this Committee, especially, to examine the value of drug testing as a means of dealing with the problem of drug abuse. I think what drug testing ultimately does is take away the responsibility from managerial and supervisory personnel who interact with people in their charge on a day-to-day basis to notice when there is a problem with job performance. Now, that job performance may be due to any number of reasons in addition to drug abuse, but the point is these are the people who have that responsibility as a matter of their job description and these are the people who are much more capable of dealing with it in the context of the specific work place involved.

The problem we're having is that, because of this general extrapolation of the statistics on drug abuse in society to each and every workplace, we're ignoring the differing conditions, in the workforces, and workplaces of differing occupations. And we're assuming that the same kind of program will have an effective, successful conclusion when it's deployed in each and every occupation. That simply is not true.

Mr. **Bateman**. Well, trying to extend that and not speaking any conclusions to which I have arrived, and I have not arrived at any which is satisfactory to me, but just pursuing this line of inquiry, suppose the role of Government were to mandate a regulatory regime for the methodology, the protocols, the reporting, the nature of drug testing where drug testing is performed, and couples those regulatory considerations with an incentive program for private employers to do drug testing, where do you come out legalistically?

Mr. **Adler**. Well, of course, the Government's standards and procedures in such a regime would themselves be subject to challenge in terms of their comportment with the Constitution and other statutes.

Mr. **Bateman**. Well, I'm——

Mr. **Adler**. But beyond that——

Mr. **Bateman** [continuing]. I'm leaping to an assumption that this is——

Mr. **Adler** [continuing]. The question also——

Mr. **Bateman** [continuing]. Whoa, whoa. I'm not sure that we don't benefit one another by listening.

Mr. **Adler**. Sure.

Mr. **Bateman**. I am assuming, for the moment at least, that such regulations would be discreet, well-conceived, and eminently defensible on practical and scientific basis. Now, take it from there.

Mr. **Adler**. Well, I would say that, again, we would question the value of urinalysis drug testing simply because of its lack of predictive or probative value for determining impairment on the job.

Mr. **Bateman**. Thank you, Mr. Chairman.

Mr. **Jones**. Mr. Pickett.

Mr. **Pickett**. I have no questions.

Mr. **Jones**. Thank you, Mr. Pickett.

Mr. Adler, thank you very much for your presence here today.

Mr. **Jones**. Next, we'll hear from the Operators Panel: Mr. Corrado, Mr. Farrell, Mr. Verdon, Mr. Bernstein, and Mr. Sanborn.

Is the Chair correctly informed that there will be one statement from this group? No? OK.

Your prepared statements will be inserted following the oral presentations. Mr. Corrado, you are recognized.

STATEMENT OF ERNEST J. CORRADO, PRESIDENT, AMERICAN INSTITUTE OF MERCHANT SHIPPING

Mr. **Corrado**. Thank you, Mr. Chairman. I don't know if I'm the spokesman for the group. My understanding was that each witness was going to make a presentation.

Mr. **Jones**. I've been corrected, and that is correct. But I do hope that each one will contain it within the constraints of a reasonable time. You may proceed. Everybody's going to be recognized.

Mr. **Corrado**. Thank you, Mr. Chairman. I'll lead off then. I'll be the leadoff batter.

My name is Ernest J. Corrado. I'm President of the American Institute of Merchant Shipping, which is a trade association representing 20 U.S.-flag carriers in the dry and wet bulk and liner domestic and international trades.

Mr. Chairman, we, of course, recognize the problem with respect to drug abuse in the Country, and we certainly don't want expensive pieces of equipment costing multiple millions of dollars being operated by anyone under the influence of drugs or alcohol.

However, the present rule that was promulgated by DOT causes us many problems. It impinges upon the rights of the individual, which the prior witness very eloquently and competently laid out. It affects the employer both economically and in his operations. We, at the present time, are most concerned about the time constraints with the rule. The facts are that the other modes of transportation; namely, railroads, trucks, buses, and airlines, got what's called an advance notice of rulemaking, which gives 90 days. The maritime industry did not. It got a notice of rulemaking which gives 60 days to reply. This is a discriminatorily shorter period of time for maritime than the other transportation modes.

The witness for DOT this morning equated the maritime industry with pipelines and mass transit, and indicated they also, the same day I think it was, got notice of proposed rulemaking for 60 days. Mr. Chairman, if DOT cannot distinguish between the maritime industry and pipelines, and the operation of a vessel, and a stationary pipeline, then I think we're in big trouble. And that's the kernel of our problem. We feel that we have been discriminated against with respect to the rule. That's clear, the timeframe is shorter for us. We asked for an extension of the timeframe and that was refused, so that's about where we stand with respect to an extension of time. Probably, we're going to have to operate within the timeframe we've been given, and that was not sufficient time for a rule of this complexity and length which asks some 83 questions, and deals with a number of complex problems. It is not sufficient time for us to really straighten out the complexities and get everything straight with our members and respond. We did respond. We sent our comments in by the required date, October 6, 1988, but it really was not sufficient time.

Since we have been refused our request for time, the question is what's left? Well, I think my recommendation, or our recommendation, Mr. Chairman, would be perhaps that the Committee should consider legislatively mandating a study, maybe 4 to 6 months, on this rulemaking and this problem. There are many, many issues here that beg for consideration and further study. For example, all morning the question has come up with respect to U.S.-flag coverage and foreign-flag noncoverage. It does seem rather odd to only impose the rule on 5 percent of the vessels coming within the United States waters and ports, when 95 percent are not covered. On the other hand, there are lot of problems inherent in covering the other 95 percent, the foreign-flag vessels. There are jurisdictional and sovereign immunity problems, and if you cover them then you've got to consider comity and reciprocity, and that nasty word, retaliation. And, if you cover them, probably the countries on the other side of the oceans will cover our vessels and test our people, and I'm not sure we'd like that any more than they'd like us asserting jurisdiction on their vessels and testing their seamen.

Cost in the rule, $62 million. Our people think it will be at least double that. Cost is something that should be studied. The idea of the master doing the testing a thousand miles out at sea is an issue that must be studied—the responsibility of the master is to operate the vessel, not juggle bottles of urine. We have great problems with post-accident testing. There are a number of areas, Mr. Chairman, that require further consideration. One could go through the whole rule and find areas that require further study. As a consequence, I would recommend in all the circumstances that the Committee consider legislatively mandating a study, not of too great a duration, but 4 to 6 months' seems reasonable, in order to try to iron out some of these issues before we impinge on the rights of the individual and the employer. The prior witness, I thought, really laid out the problems in that regard.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Corrado can be found at end of hearing.]

Mr. JONES. Thank you, Mr. Corrado.

Mr. Farrell.

STATEMENT OF JOSEPH A. FARRELL, PRESIDENT, AMERICAN WATERWAYS OPERATORS

Mr. **Farrell**. I'm Joe Farrell, Mr. Chairman, President of the American Waterways Operators, which represents the barge and towing industry. We have a formal statement, which I assume will be admitted in the record.

Mr. **Jones**. Without objection.

Mr. **Farrell**. Very briefly, in summary, we're encouraged by what we've seen here today. I wasn't at all sure, frankly, what the nature of the Committee's interest was. We are particularly encouraged by the nature of the exchange between the Committee and the Department of Transportation representatives. Obviously, the matters that are of concern to our industry are also of concern to you.

We are eager to enter into a partnership, again, with the Department of Transportation to fashion a program which will work. One thing that's clear from all the commentary this morning is the universal commitment we all have to making sure that the maritime industry is free of drugs. We believe we can make a major contribution to achieving that goal by working in partnership with the Department of Transportation. We have an impressive record of that kind of partnership in the past. There's every reason to believe that it will work in the future.

Quite appropriately, there has been a lot of attention paid to data this morning. I'd like to offer you some that hasn't come up, and that might suggest some directions for a proper rule. I must say that the data is anecdotal, but it is useful to consider. The great majority of companies in our industry have their own drug testing programs in place already. And the information that I get is that in the preemployment tests the results do indicate what all of us have talked about today: drugs are prevalent in American society. People who test positive in preemployment tests are not employed by the companies.

Interestingly enough, the tests that are performed thereafter, periodic or in those cases where companies have elected random testing, show virtually a trivial positive result, which seems to suggest that the preemployment testing screens out a great number of the problems.

Finally, let me say we're particularly encouraged, Mr. Chairman, by the admonition that you gave to the Department of Transportation representatives at the end of their session. I would hope that that might be formalized from this Committee to the Secretary of Transportation, because I believe it's right on.

Thank you.

[The prepared statement of Mr. Farrell can be found at end of hearing.]

Mr. **Jones**. Thank you, Mr. Farrell.

Mr. Verdon.

STATEMENT OF WILLIAM P. VERDON, PRESIDENT, UNITED SHIPOWNERS OF AMERICA

Mr. **Verdon**. Thank you, Mr. Chairman, and Members of the Subcommittee. My name is William Verdon, and I represent the United Shipowners of America, who represents 97 percent of the U.S.-flag capacity in the liner industry today. We've submitted our statement for the record, and we ask that it be so accepted.

I'd like to take the short time I have here today to focus just on two issues. The first issue is that the liner industry, which I represent, is a lot different than the entire maritime industry that is broad-brushed into this proposed regulation. And the reason it's important to point out that we are different than the entire maritime industry, and that, in fact, there are many, many different sub-industries, is that in our industry there is no evidence, that we know of, empirical or otherwise, of drug use in the last 5 years. There is no evidence of casualties caused by drug use in the last 5 years and, indeed, knock on wood, there's no evidence of serious casualties for any reason whatsoever in our industry in the last 5 years.

And that becomes important when you listen to the somewhat frightening testimony we heard this morning on behalf of the DOT and the Coast Guard. The Coast Guard representative testified that there were 156 deaths over the last 6 years caused by alcohol or drugs. But on further questioning from one of the Subcommittee Members, he indicated that it was in all likelihood all alcohol-related. So it has nothing to do with what we're talking about today. And secondly, it has nothing to do with the international liner industry which I represent, where there is no evidence whatsoever.

The second thing I'd like to focus upon is a piece of the testimony by General Counsel Vance for the DOT. And that was a sentence that he said in response to one of the questions as to whether or not he had any empirical data to support such a far-ranging intrusion into the privacy rights of the individuals. He said that there is no evidence of drug use—let me correct that. He said there is no evidence of drug use in the industries that he wants to regulate, and furthermore there's no evidence that it's any less than what's in society at large. What he ingenuously has done is to turn the burden of proof around from the burden of proof rightfully being on the investigator to it becoming on the targeted industry, so that everybody in society would have to prove the negative that they're from drug abuse.

And that is frightening because one of the remedies that we're talking about here would be to have a fact-finding investigation or a hearing of some sort to see if there is a problem and what the extent of the hearing is. Well, that would be good if we had some faith that the DOT would then listen to the results of that hearing, and if there was no evidence of a problem, walk away from it. But his testimony this morning seemed to be saying that we will just assume that there's a problem, even if we know there is no problem, and even if you can prove to us there's no problem. We will work on the assumption that you have a drug problem, and go ahead and have drug testing.

And I would like to end by saying that when we're fooling around with invasion of individual's rights, and talking about constitutional rights, assumption has no place in that arena.

Thank you very much.

[The prepared statement of Mr. Verdon can be found at end of hearing.]

Mr. JONES. Thank you, Mr. Verdon.

Mr. Bernstein.

STATEMENT OF ALAN D. BERNSTEIN, PRESIDENT, NATIONAL ASSOCIATION OF PASSENGER VESSEL OWNERS, AND GENERAL MANAGER, BB RIVERBOATS, CINCINNATI, OH

Mr. BERNSTEIN. Thank you, Mr. Chairman, and members of the Merchant Marine Subcommittee. My name is Alan Bernstein, and I am president of the National Association of Passenger Vessel Owners [NAPVO] and General Manager of BB Riverboats in Cincinnati, Ohio. National Association of Passenger Vessel Owner's 400 members operate and supply riverboats, excursion boats, dinner boats, car and passenger ferries, whale watching operations, and own businesses from Cape Cod to Hawaii. NAPVO members operate more than 750 small passenger vessels ranging from the size of six passengers to 2,200 passengers and carried more than 30 million passengers last year. The small passenger vessel business represents both the healthiest and safest sector of the marine industry today.

My company, BB Riverboats, is typical of the type of member within NAPVO. It is owned by my family, operators of restaurants in the Cincinnati community for more than 30 years. We run six vessels ranging from the size of 20 passengers to 600 passengers, offering a variety of dining cruises and excursion cruises, both for the general public and for charter. We have more than 200 employees, of which 125 are seasonal. Approximately 30 of these employees are directly responsible for the safe operation and navigation of the vessel, while 145 assist in the food preparation, service, and entertainment. We strive to run a company on a personal level, bringing the family aspect of our business to the forefront. We know that service is a hallmark of success of any hospitality oriented industry, which is what we are. I know that we cannot take lightly the illegal use of illicit drugs or effects of alcoholism or alcohol abuse. The cost to our communities and families is too great. The cost to a business can be fatal.

NAPVO members have been heartened by the recent efforts of our Government to move vigorously in addressing the addiction epidemic in our society. It is clearly a problem that eludes local solutions and patchwork cures. It is a crisis that all members of the community must pitch it to help address. As responsible members of the business community, we recognize our responsibility to be a part of the solution and not part of the problem.

This brings us to the dilemma facing the NAVPO members today. The U.S. Coast Guard, at the direction of Congress, has issued broad reaching proposed regulations that would require us, as employers, to step into the personal lives of our employees and monitor their personal behavior. While we recognize the value of a program that gives us important information about the alcohol and drug usage patterns of our employees, we are uncomfortable with managing the program. Let me briefly outline our position with regard to the proposed drug testing program.

NAPVO is supportive of the concept of drug testing of crew required for the safe operation and navigation of a vessel. NAPVO supports preemployment testing of licensed crewmembers, and post-accident testing of required licensed crewmembers. Post-accident testing should be conducted by an impartial, independent Government agency.

NAPVO is not supportive of the version of proposed rulemaking for the following reasons: One, the rulemaking covers too wide a scope of personnel. There is no reason to include such nonessential personnel as kitchen help, service help, concessionaires, or band members who do not contribute to the safe operation of a vessel. These personnel should be excluded from the rulemaking.

Two, the frequency of testing is too great and would result in excessive cost. NAPVO believes that random testing of 25 percent of the employees would meet the requirements of this program.

Three, such a testing program would create an adversarial relationship with employees, which would be a serious detriment to the smooth operation of NAPVO's small business proprietors, many of whom are family owned.

Four, the policing, enforcement, and execution of testing of employees should not be conducted by the employer or its agent. This sets up a potential liability problem for the employer. Additionally, the average small business employer is not going to be knowledgeable as to the procedures of testing and ensuring that chain of custody and quality control are maintained.

Five, companies should not be forced to provide alcohol and drug rehabilitation for all of their employees. This would represent an enormous cost of medical dollars and lost work time.

Six, the regulations do not provide any exemption for seasonal or temporary employees.

Seven, the regulations raise a host of legal and economic problems at a time when the maritime industry is faced with many other pressing concerns. The responsibility for addressing alcohol and drug problems rests with the community and family, not solely with the employer.

And, eight, the rule does not include bareboat or demise charter operators or foreign crewed vessels operating in the United States waters, presenting additional inequitable operating conditions for legal operators.

Our final concern is the inexcusably short time given us to provide our comments. The far-reaching proposal came during the height of our busy Summer season, giving our members little time to evaluate this complex and costly new Government regulation. The resistance of the Secretary of Transportation to allowing a fair and reasonable regulatory review process is unfortunate.

Thank you very much.

Mr. PICKETT [Acting Chair]. Thank you, Mr. Bernstein.

Mr. Sanborn.

STATEMENT OF JAMES H. SANBORN, EXECUTIVE VICE PRESIDENT OF OPERATIONS, MARITRANS GP, INC., PHILADELPHIA, PA

Mr. SANBORN. Thank you. My name is James Sanborn. I'm Executive Vice President of Maritrans. And I think at the outset I'd like the Committee to be aware of the fact that I'm neither a lawyer nor a lobbyist, and except for a year in the Navy and a couple of years in graduate school, I've had 30 years in the maritime industry.

Our firm has been in the petroleum transportation business for about five decades. We hold ourselves out to be the largest independent marine transporter of petroleum in the United States. Our operating area covers from the maritime provinces to Mexico, and I think it's safe to say that our safety record, the professionalism of our people on our vessels is well recognized throughout the industry.

Our formal comments, my statement, has been submitted. Some of the points that we've made in there certainly have been amplified most eloquently this morning. Our very great concern over the lack of data from which this proposed rulemaking is drawn has only been heightened by the statements of Mr. Vance and his colleagues. We are extremely concerned about the cost of the program; that's been borne out. Mr. Adler certainly has added to our fears as to the constitutionality of drug testing and our abhorrence for getting involved in the legal morass of Herculean proportions. And, lastly, we find it most objectionable that the United States Coast Guard, or any other organization within the Government, wants to put us in the role of policemen creating an adversarial relationship with our people whom we hold to be very close.

Finally, I think I'd like to make three comments, and I'd like to make them to you from this prospective: that of an industry leader, from a businessman, from a company which has a very high regard for its employees, and the professionalism of its employees, bearing in mind the responsibility that we have for the dangerous cargoes that we carry; our regard for safety; and, lastly, since we are a public company, for the grave concern we have that we do the proper job for our owners.

Now, from our experience as a company, we really do not have a major problem. We certainly do not have a problem in either drug abuse or alcohol abuse of the proportion suggested by the proposed rulemaking. Where we have had situations we have found that they are most effectively addressed on an individual basis. We're a very close-knit organization. We have a very low turnover. There is a great deal of interaction between those shoreside, as well as our people on our vessels. Our vessels have very small crews, and detection is generally fairly easy. Our system seems to work just fine, and we'd like to leave it that way.

The second point I'd like to make to you from that same prospective is that 60 percent of our seagoing employees are represented by two national unions; and, consequently, they and we are parties to a collective-bargaining agreement which I have signed. Now, we view our contracts with the unions governing those employees just as we do any other contract whether it be with customers or suppliers. We honor them, and we carry them out to the letter. Therefore, in view of the Coast Guard's apparent cavalier disregard for the provisions of the National Labor Relations Act, we view that with a great deal of alarm.

I guess the last point that I'd like to leave with you is that, frankly, what we see in this proposal will cause a gross misallocation of resources; and, frankly, we see it as resulting in a reduction in safety as well as a reduction in professional training. Now I say that because our company has worked over many years to build a safe and productive operation. We've done so by investing millions of dollars, untold hours, and much of our support resources in the training of our seagoing cadre. The results have been gratifying, and they've been supported by the fact that our insurance premiums for marine insurance have continually lowered over the past several years.

However, be that as it may, even our resources are strained to meet our own training and safety objectives. We're hard pressed to find the time of both management and our seagoing leadership to complete each year's program. Now, if we are to conduct a program where we must train all of our seagoing supervisors and much of our shoreside supervisory personnel to be able to conduct testing, whether it's urinalysis or eventually through blood sampling, retain custody, and so on and so on and so forth, and maintain those skills, then the only alternative I see is that we must divert some of those precious resources from some safety and training as a result of this program.

Furthermore, we add that it is a gross misallocation of resources when you consider that the Coast Guard has already got a nationwide cadre of marine casualty investigators, professionals. Professionals who are trained at their own extensive facilities not too far from here, down in Yorktown. If the Coast Guard needs more people, and they need more money, they ought to be up here asking you for it, and not asking us for it. Frankly, we're alarmed at the potential consequences, not only for our company, but the industry as a whole.

Thank you.

[The prepared statement of Mr. Sanborn can be found at end of hearing.]

Mr. PICKETT. Thank you, Mr. Sanborn.

Anyone can comment. The Marine Index Bureau included in their written statement the fact that drug abuse is so pervasive today that many marine employers consider it the single greatest problem in finding qualified personnel and retaining employees.

I know, Mr. Sanborn, that you said this is not the case in your company, but would any of the other members of the panel care to comment on this?

Mr. VERDON. Well, Congressman, on behalf of the United Shipowners of America representing the U.S.-flag liner industry, we'd like to comment, and say that echoing Mr. Sanborn, that we do not have a widespread or pervasive problem either, and would be interested in knowing where the statistics from the Marine Index Bureau come from, and whether or not it's related to the deepsea international fleet, or from some other portion of the broad definition of maritime industry.

Mr. PICKETT. Anyone else want to comment on that?

Mr. FARRELL. Just to reiterate what I said in my remarks, Mr. Chairman, that we really don't have any evidence that this is a problem with the operators. There is some evidence, anecdotal evidence, that in screening candidates for employment, that it is a problem. But, they're screened out. And I would assume where we all come out is that we need to find out the extent of the problem, or to the extent that it exists before we fashion a solution to something we don't understand.

Mr. PICKETT. All right, thank you.

Mr. Bateman.

Mr. BATEMAN. There's been testimony to the effect that a number of companies have already implemented drug-related programs to try and absolve themselves from the economic and social responsibility for damages that would occur from drug use among their personnel. And I get the impression that there are aspects of this proposed rule that are widely accepted and in practice among the industry. How much sense would it make for the Department of Transportation to implement those portions of the proposed rule which have already received wide acceptance in the industry, and thereby make them mandatory upon those segments which had not, and leave out the rest of these requirements which are predicated upon a rather gross kind of an assumption that there is a problem which no one has been able to demonstrate. Would you all like to comment on that?

Mr. FARRELL. I would suggest, Mr. Bateman, that—of course, I don't know what the docket shows in the 360-some responses that Mr. Vance referred to, but we're back again to fashioning a solution to fit the problem, and we haven't defined the problem. I'm hopeful from some of the things Mr. Vance said that they are going to take into account the comments that they've gotten.

My concern, and the reason I asked Chairman Jones to consider a formal request to the Secretary of Transportation, is that I think what's needed is another pass at this so that there's a full dialog between the industry and the Department of Transportation. To publish a final rule with no other exchange, I wouldn't do that if it were left to me. I don't think that's a prudent way to do it.

Mr. BATEMAN. Well, let me offer these comments, especially in view of the fact that we at least have someone from the Coast Guard who's still here.

I was heartened, somewhat, by Mr. Vance's statement that he did not anticipate the final promulgation of regulations until the end of the year or the first of next year. I take some heart in that, but I don't know as he expressed it in terms of the kind of commitment I'd like to see to that timeframe. I do anticipate raising that question formally for the record, and would offer as a suggestion for those who might be taking messages to the Department of Transportation that, if by virtue of the three hundred and some responses in hand, are you going to require that long before a regulation is promulgated, and it would certainly seem to me that that's not an excessive amount of time in lieu of the number of responses in hand, that they could certainly announce a further extension of a comment period in light of testimony that there are those who have not had a full opportunity to register their comments. I hope that we're going to find that the Department is going to be reasonably forthcoming in terms of this kind of a timeframe. And the better assurance to the industry that their position, their views, or their input is indeed welcome and will be taken into account.

I didn't mean to make a speech on that, so if any of you have further comments, I'd be happy to hear them.

Mr. **Farrell**. We like that speech.

Mr. **Corrado**. I wonder if I might make a comment, Mr. Bateman, with respect to that.

When you have a number of members in an organization, you get varying views. Some of our members are absolutely adamant against the rule. We have some other members who, with a few changes, could live with it. But I would agree with Mr. Farrell, I think under all the circumstances, the best thing is to take another cut at it. I've found with respect to rules and laws, and things like this, when you try to fix it, it really doesn't work. It's usually better to begin at the beginning. In other words, I don't think you can patch it up.

There may be some things that are acceptable, but what's acceptable and not acceptable is going to be different among all of us.

Thank you, sir.

Mr. **Verdon**. Mr. Bateman, I'd like to say that we believe that maybe more is needed than just an extended comment period, because comments will only be a unilateral and one-way approach. I think what came out this morning indicated that what's needed is some empirical fact-finding methodology to see what the extent of the drug problem is, if there is any to begin with in each of the individual subgroups of the whole maritime industry.

You asked a question earlier, or you alluded to the fact that the seamen on the U.S.-flag merchant fleet, at least in our industry, is an elderly group as opposed to the statistics that show drug use is higher under the younger group. Our average age is 51, if you meld the unlicensed and the licensed. And I don't—and again, I'm not an expert on it, but I think that's something that some empirical fact-finding investigation should be done to see what kind of problem you have in that age group. So I think more than just a comment period is needed. It needs a fact finding.

Thank you.

Mr. **Pickett**. Is that it?

Mr. **Bateman**. That's all I have, Mr. Chairman, except to say that I can even see coming at us a new constitutional argument that we are going to be guilty of age discrimination if we proceed along this line, and I don't know where we come out on that.

Mr. **Verdon**. Mr. Bateman, if I might just add one thing. The Supreme Court has taken two of the drug cases on and are going to hear it this fall. There are other cases that are wending its way up. I think that prudence would indicate that if we had a fact-finding investigation, or a period of time to allow a constructive dialogue with the Government and the industry that they're trying to regulate for over a hundred million dollars, that we may find ourselves at least in a better position, 3, 5, or 6 months from now, with some guidelines from the Supreme Court or the Courts of Appeals, saying what is or what is not proper in a constitutional sense. Because it seems silly to promulgate a rule when the weight of the authority in the majority of the cases say that the regulation we're looking at on its face will be unconstitutional, because they themselves admit that there is no evidence and they're going on assumptions.

Thank you.

Mr. PICKETT. All right.

Gentlemen, we do have a few questions we may want to submit in writing for the record, and would appreciate your cooperation in responding to those.

We have a vote called, two votes, actually, and I'm hoping we can resume this hearing at 1 o'clock and gentlemen of this panel, we appreciate very much your appearance here today, and thank you for your testimony.

[Recess.]

Mr. PICKETT. The Subcommittee will come back to order.

The next panel is the Association Panel, Mr. Schneier, Mr. Person, Mr. Havnen, and Mr. Lassen.

Your prepared statements will be inserted in the record. Proceed in the order in which I called your names, if you would, and you can summarize your statements.

STATEMENT OF EZRA SCHNEIER, VICE PRESIDENT, MARINE INDEX BUREAU, INC., NEW YORK, NY

Mr. SCHNEIER. Thank you, Mr. Chairman.

My name is Ezra Schneier, I'm the Vice President of the Marine Index Bureau. For over 50 years, the Marine Index Bureau has served as the sole commercial repository for records of accidents, injuries, and illnesses involving marine personnel. Today, MIB collects such records from more than 350 member companies, representing every aspect of the U.S. maritime industry. These companies are engaged in ocean commerce, inland and coastal towing, dredging, commercial fishing, passenger transportation, offshore supply, oceanographic research, and many other activities. Virtually all members of MIB stand to be affected by the proposed rulemaking.

This industry's requirements for drug and alcohol screening programs are just as diverse as the types of operations affected by the proposed rules. Just as surely as an oceangoing containership would be hard aground in the upper reaches of the Mississippi, these rules cannot be thought to apply to our entire industry and the many pockets which make up the maritime sector. The Coast Guard cannot quickly craft a "one size fits all" solution to a problem as intractable as drug and alcohol use.

The Department of Transportation must set aside its hurried-up schedule to enact these rules, and take the time necessary to devise regulations which will work; regulations tailored to fit each segment of our diverse industry; regulations that do not interfere with employers' voluntary, longstanding efforts to address this issue; regulations which have a chance to succeed.

Our consideration of the proposed rules leads to the conclusion that the elimination of alcohol and drugs will best be accomplished by voluntary programs developed by each employer to fit his specific operation. Again, one size does not fit all. Discussions among

MIB members since the issuance of the notice of proposed rulemaking indicates that all of the components described can work for some companies, but no one company's operations can or need to include each and every element of the proposed rules.

In the opinion of MIB's counsel, as a result of the Coast Guard deputizing vessel owners to perform their law enforcement function, one could expect Constitution-based challenges to the regulations. Whereas current, employer-sponsored programs do not invite constitutional challenges, the proposed rules will encourage lengthy and expensive litigation to determine such issues.

Post-accident testing is extremely problematic. Many feel that this is an investigative function best handled by the Coast Guard themselves. Positive test results may increase an owner's liability in civil litigation. Understandably, employers are reluctant to accept the responsibility of collecting and reporting this kind of evidence.

In sum, the proposed rules would over-regulate the various sectors of our maritime industry. Government regulation of this magnitude would undoubtedly interfere with the programs now in place and would actually serve to interfere with attaining the goal of a drug-free environment. A voluntary approach to testing, combined with the Coast Guard's existing rules to reduce alcohol abuse and drug usage, is the best way to address the issue.

Thank you very much.

[The prepared statement of Mr. Schneier can be found at end of hearing.]

Mr. PICKETT. Thank you.

Mr. Person.

STATEMENT OF BILL S. PERSON, MANAGER OF INDUSTRIAL RELATIONS, ROWAN COMPANIES, INC., HOUSTON, TX, ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS [IADC] AND THE NATIONAL OCEAN INDUSTRIES ASSOCIATION [NOIA]

Mr. PERSON. Good afternoon, Mr. Chairman. My name is Bill Person. I'm Manager of Industrial Relations for Rowan Companies, Incorporated. Rowan Companies serves the petroleum industry as a contract driller, onshore and offshore in domestic and international areas.

My testimony is presented on behalf of all members of the International Association of Drilling Contractors. I serve as the Texas Gulf Coast Vice President for the IADC.

It is offered also on behalf of the drilling contractor members of the National Ocean Industries Association. Other industries represented by the NOIA have submitted written testimony covering the particular impact of the proposed regulations and how they uniquely impact their operations.

[EDITOR'S NOTE.—See the record statement by the National Ocean Industries Association at the end of the hearing.]

The offshore drilling industry has been a leader in developing and implementing drug testing programs in a very unique work place and environment. We estimate that drug testing, including random testing, is presently conducted on 90 percent of all active U.S. offshore drilling rigs.

The industry's programs have been tested in the courts and in the marketplace. The courts have sustained the propriety of our policies. Where they have not, we have changed our programs to comply. More importantly, our employees and their families have supported these policies as a positive step by the employer to provide them with a safe place to work.

Over the past five years, the lost time incidence rate for offshore drilling has dropped from 5.29 injuries per 100 workers to 2.65, a reduction of 50 percent. Without question, a significant portion of this reduction is due to the industries' widespread application of drug testing policies.

I represented the IADC and Rowan Companies at the regional and national level of the White House Conference for a Drug-Free America. I also served on the Transportation Advisory Committee. Our industry took a very strong anti-drug stance. I was concerned, quite honestly, that the offshore drilling industry seemed to be the only industry participating in the transportation group that had implemented strong, vigorous anti-drug programs.

For these reasons, we commend the Coast Guard in principle towards combating drug abuse in the marine environment. However, the industry views the Coast Guard's proposed rulemaking on drug testing with alarm.

The offshore drilling industry supports drug testing to ensure safety of personnel and the environment. We cannot support the specific requirements set forth by the Coast Guard in these proposed rules.

These rules are impractical and ineffective for application in our industry. Despite their good intentions, they will have the actual result of destroying the achievements already made and lead to an increase, not a decrease in drug-related safety problems aboard offshore drilling units. Our proven expertise in the area of contraband interdiction should be taken into consideration to avoid regression on this subject.

We believe it is not meaningful to compare factory workers, truck drivers, aircraft pilots and mechanics, or other land-based workers to workers engaged in offshore drilling. Our employees live and work offshore for their entire shift, which is generally 14 days without any land-based connection. We, therefore, believe that such a broad based standard as proposed by the Department of Transportation is inappropriate. Current offshore drilling industry programs and practices should be allowed to remain in force if they produce the desired results.

In conclusion, Mr. Chairman, we wish to make some recommendations concerning the proposed rulemaking.

One, the proposed regulations as they apply to offshore drilling units should be confined to the United States Outer Continental Shelf. The rules do not give full consideration to the drilling industry's international manpower situation and the limitations placed on mobile offshore drilling units operating in the territorial waters of other sovereign nations. We do not believe that enforcement of these proposed drug testing requirements can be successfully achieved in non-U.S. waters.

Two, the Coast Guard should not apply these regulations to offshore drilling units. Provision should be made for approval of an alternative rulemaking for drug testing of personnel at isolated or remote locations where the personnel are confined to the facility. Alternatively, we recommend the Coast Guard consider a separate rulemaking to be applied to mobile offshore drilling units. The Coast Guard should draw upon the drilling industry's expertise in the area of contraband interdiction. Any final rule must allow each drilling contractor to tailor their program to meet their specific goals. Current programs have proven their effectiveness and should, therefore, be allowed to remain in their present form.

Three, recognizing the unique operating circumstances and manning requirements of the offshore drilling industry, we believe the scope of the proposed rulemaking is unclear regarding third party personnel. That being those employees of the oil companies and various subcontractors who are not employed by the vessel owner. All personnel aboard the unit, whether temporarily or permanently assigned, should be subject to, at a minimum, random/unannounced testing along with all other personnel aboard the rig. Clearly, who is responsible for post-accident testing of the third party personnel must be determined. Is it the actual employer or the vessel owner?

It should be clear that the offshore drilling industry is not opposed to drug testing. In fact, the industry has always considered drug abuse by anyone as a serious safety issue that cannot and will not be tolerated. The industry stands ready to assist the Coast Guard in drafting regulations that specify self-certification of currently proven contraband interdiction programs. The industry has several model company programs that have proven, over the years, that they can obtain the desired results. We know that they work.

Thank you, Mr. Chairman, for the opportunity of making my industry's recommendations known.

[The prepared statement of Mr. Person can be found at end of hearing.]

Mr. **Pickett**. Thank you, Mr. Person.

At this time, we'll recess for 5 minutes so I can run over and vote. I'll be right back.

[Recess.]

Mr. **Pickett**. I call the Subcommittee back to order.

Mr. Havnen, I think you're the next speaker.

STATEMENT OF CHARLES R. HAVNEN, VICE PRESIDENT AND ACTING EXECUTIVE DIRECTOR, OFFSHORE MARINE SERVICE ASSOCIATION, NEW ORLEANS, LA

Mr. **Havnen**. Mr. Chairman, other distinguished Members of the Subcommittee, my name is Charlie Havnen. I'm Vice President and Acting Executive Director of the Offshore Marine Service Association [OMSA]. OMSA is pleased to be afforded the opportunity to present its views to the Subcommittee concerning the proposed rulemaking project. OMSA is a national trade association formed to represent the interests of the owners and operators of vessels engaged in offshore mineral support activities, including offshore construction, pipe laying, dredging, and resupply efforts. OMSA has a membership of 113 operating companies, owning and operating some 2,000 vessels with upward of 20,000 employees.

Mr. PICKETT. Mr. Havnen.

Mr. HAVNEN. Yes, sir.

Mr. PICKETT. Your written statement is going to be made a part of the record in its entirety. If you could just summarize for us the high points, if you would care to. You're not obligated to. We are under a little bit of a time pressure. There's another hearing scheduled at 2 o'clock in this room. So if you'll cooperate, it will be appreciated.

Mr. HAVNEN. Yes, sir.

I think on that concept then, I think it's important that I let you know that OMSA very vigorously supports testing programs. The offshore industry has been the leader in testing and anti-drug abuse and alcohol abuse programs for the last 40 years. At its very inception, alcohol was determined to be a potential problem in the offshore industry, and the industry took great pains to initially rid itself of that problem, and then to make sure it stayed off of the vessels.

That effort has continued. As the technology evolved, we got into drug testing, preemployment drug testing, unscheduled testing, and in some cases, post-casualty testing, particularly when an individual had received medical treatment of some sort.

This project probably should have been published as an advance notice, rather than as a notice. It would be nice to see a supplemental notice follow, with an additional dialogue. The Department seems to be asking us to trust them. They're here to help us. I don't think I really believe that. They certainly have not been responsive to many of the contentious issues, even to the resolution of philosophical issues. They have not acknowledged the uniqueness of the maritime among the transportation industries, because of the remoteness from medical facilities, the isolation from enforcement authorities. None of this has been taken into account.

They would have our employees do testing and make law enforcement judgments upon other employees. That puts us at great risk, legally. We don't like it.

They seem to have confused the health and welfare issues with law enforcement issues. Another way of putting the same thing is, confusing impairment issues with intoxication issues. Intoxication is defined legally within the rules of the Coast Guard. All of the intoxication issues should be removed from this project and be made a part of law enforcement efforts on the part of the Coast Guard. If the Coast Guard wants to do testing post-casualty on our individuals, I have no problem with them coming aboard and doing that. I have problems with my people doing that testing.

The implied consent doctrine seems to be fallacious and improperly based in fact. Scientifically, random testing does not work in the maritime. We have difficulty in performing those tests when a man is on his off-time. We have great difficulty in performing the tests when he's at sea; particularly with the concept of the HHS standards, tests can't be performed at sea. You'd have to take a physical specimen from the man, hold that in abeyance until we could get to a facility, and transmit that to a lab. In the interim, we're at great risk. The man may well injure himself, and there have been a number of specific instances where individuals have been injured while the test is enroute to the lab. And then, of course, the test proves positive, the guy knew that he was dirty, knew that he was going to be tested positive, and found a way to get off the vessel and onto Jones Act Maintenance and Cure before the test results were in. If other persons had been injured in those casualties, I think there could have been very serious consequences.

The HHS standards: It's the Association's view that these were promulgated without due process, at least with respect to commercial enterprise. They were standards evolved under the Executive Order and, ultimately, a statute to assure a sameness of testing among Government employees. They were never intended, at least in my belief, they were never intended to be applied to commercial enterprise.

There's no evidence that any anti-substance abuse program that's in existence is ineffective. The project has taken and subverted some of that information. Some of the information provided to show the effectiveness of these programs was used convolutely to demonstrate that mandatory testing should be required. In other words, if an individual is tested positive and he's eliminated from the offshore environment, the Coast Guard used that evidence to demonstrate that everyone should have mandatory testing. That sounds like an improper use of that evidence.

Concerning the application to foreign vessels in U.S. waters, clearly, the doctrine that Mr. Vance spoke of was fallacious. Any foreign jurisdiction has control, or can exercise jurisdiction, over vessels within its waters if it chooses to do so. The doctrine he spoke of relates to a foreign entity that chooses not to exercise that jurisdiction. And if they choose not to, then it is considered legal for the U.S. law to prevail. These rules do not work in foreign waters. U.S. vessels that enter foreign ports have to take pilots. Those pilots are, technically, crewmen. Clearly, those crewmen cannot be a part of this program. They cannot get preemployment testing. They cannot be subject to random testing. There are other foreign individuals, foreign employees, that may technically be considered to be crewmen on vessels that engage in international traffic. They have to be excluded.

I would submit that a more proper forum for the Coast Guard to air all of the contentious issues and attempt to resolve them might be an advisory committee, which the Congress could make mandatory, and would put this whole issue back in proper prospective. I think the thing that bothers me more than anything else is we have very little consensus or agreement on the philosophical approach of the issues and the method of resolution between the industry and the Coast Guard. To see final rules come out with detailed specifications without some sort of philosophical meeting of the mind, I think could be highly damaging to what little remains of the U.S.-flag.

Thank you.

[The prepared statement of Mr. Havnen can be found at end of hearing]

Mr. Pickett. Thank you, Mr. Havnen.

The next panelist is Mr. Lassen.

STATEMENT OF THOR J. LASSEN, GOVERNMENT RELATIONS REPRESENTATIVE, NATIONAL FISHERIES INSTITUTE

Mr. LASSEN. Thank you, Mr. Chairman. I'll try to summarize my statement as briefly as possible.

Many of our members are operating vessels in the fisheries that are directly affected by the regulations. We estimate that there are probably around 215 fishing vessels that fall under the proposed rules. These would include approximately 90 menhaden vessels operating out of your area, Mr. Chairman, in Chesapeake Bay, and the Gulf of Mexico, 71 tuna seiners, three Atlantic freezer trawlers in the squid, mackerel, butterfish fisheries, with the remainder of the vessels operating in the North Pacific salmon and groundfish processing industries.

I do want to point out that almost all of these vessels have drug and alcohol programs. They include such things as company policies which prohibit the use and possession of drugs and alcohol on the vessel and establish grounds for dismissal. They allow vessel owners to search the crew quarters, as well as the person themselves. Preemployment testing, post-accident testing, and reasonable cause testing are also common features in these fisheries. I know the menhaden fishery and the tuna fishery both bring dogs on their vessels on a random basis to inspect for the presence of illegal substances.

One of the important points to understand is that these programs have been instituted voluntarily in order to have a safe and efficient drug-free environment in which to operate. The programs do vary with each fishery, as the operating characteristics of fisheries themselves vary. Menhaden is fished in coastal waters as a day fishery, with a crew of about 14; while your tuna and your North Pacific processing fisheries are more characterized as distant water fisheries with crews that can go up to 100 people, 80 percent of which are operating in processing rooms somewhere on board the vessel.

Without getting into the details of each of the testing regulations that were published, let me just summarize by saying that the greatest problem we see is that the regulations do not take into consideration the different characteristics of each fishery. They are too broad and written more for the transportation industry as a whole. We are not common carriers. We're food industry. We produce food using vessels as platforms to harvest and process fish. We do believe that there is a role for the Government to play here. It would be appropriate to provide for some regulations that would bar the use of the drugs or alcohol by vessel employees, but we feel the Coast Guard must leave the means of achieving that goal to the companies involved that operate the vessels.

We would encourage the Coast Guard to give us the opportunity to work with them on developing some guidelines that could support the programs that we do have in place.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Lassen can be found at end of hearing.]

Mr. PICKETT. Thank you, Mr. Lassen.

Gentlemen, we have one or two questions I think that we will ask you to respond to those written questions for the record, in the interest of allowing us to conclude our hearing today.

There was one thing that came up, having to do with the incidence of drug or illegal substance use on vessels. I think some of you may have been here when the prior witnesses of the companies were saying that they didn't believe that they had a serious problem, and I would just like to ask if there is any specific data which would indicate the extent or magnitude of the use of illegal substances in the maritime industries? If you have that, it would be very helpful.

Mr. LASSEN. Are you asking for an oral response? I'd be happy to respond.

Mr. PICKETT. I think Mr. Schneier was the one that raised this issue. In his written testimony, he said that there was a fairly pervasive use of illegal substances.

Mr. SCHNEIER. Mr. Chairman, our statement in the written testimony stated that the problem in finding personnel in the maritime industries has been focused on the high incidence of positive results in drug testing. Many companies who are members of our company, for instance, report that a very high frequency of their job applicants have tested positive and have thusly been rejected for employment. It's interesting to note that, for example, in the White House Conference on a Drug Free America, a major barge operator stated that between 50 and 80 percent of applicants for employment with his company were rejected for employment due to positive results on drug screening tests.

We find that, again, as Mr. Farrell mentioned on the panel earlier, anecdotally, that is very prevalent among some companies in a wide array of industries. Many barge and towing companies and other types of operators are finding that a percentage of potential new employees are being rejected due to positive results on drug screening tests. And this, we believe, is a strong tribute to the effectiveness of voluntary programs that are in place within this industry. Many of those companies are weeding out drug abusers from working in the industry, and from getting started in this maritime industry. Voluntary programs are effective.

Mr. PICKETT. All right.

Thank you very much. Again, we may have one or two questions that we'd like to ask for the record if you all would be kind enough to respond, we'd appreciate it.

Yes, sir, Mr. Havnen.

Mr. HAVNEN. I'd like to offer that preemployment screenings would seem to provide data against Government regulation.

There's another set of data that most of the companies that perform unscheduled testing, or periodic testing with some sort of a randomized factor to it. These programs seem to have positive hits of individuals abusing the substances of less than 3 percent. Now, the problem is that you can't just take those numbers alone. They have to be done in context within the entire program that a company runs. We have offered information concerning these specific programs both to the Coast Guard and to the Congress, and we've been unable to get anyone to come and particularly examine these programs. But I think they are very effective, and data can be captured to illustrate that, but it's difficult to take that data out of context. It has to be taken within the context of the overall program of that company.

Mr. PICKETT. We'll follow up on that. Thank you very much.

And, gentlemen, we thank you very much for your testimony here today.

Next is the Labor Panel: Mr. Landgrebe, Mr. Pecquex, Mr. Kelly, Mr. Bobb, and Mr. Lewis.

Your prepared statement will be inserted in the record. And if you would just summarize your comments, we'd appreciate it very much.

STATEMENT OF KARL M. LANDGREBE, ASSISTANT TO THE PRESIDENT, NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, ACCOMPANIED BY FRANK PECQUEX, LEGISLATIVE DIRECTOR, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA (AFL-CIO); EDWARD V. KELLY, VICE PRESIDENT, DISTRICT 2, MARINE ENGINEERS' BENEFICIAL ASSOCIATION; JOHN K. BOBB, ACADEMIC DIRECTOR, MARITIME INSTITUTE OF TECHNOLOGY AND GRADUATE STUDIES (INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS); AND MICHAEL R. LEWIS, WASHINGTON REPRESENTATIVE, INLANDBOATMEN'S UNION OF THE PACIFIC (INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION)

Mr. LANDGREBE. Thank you, Mr. Chairman.

I'm speaking on behalf of the National Marine Engineers' Beneficial Association, Seafarers International Union of North America, International Organization of Masters, Mates and Pilots, the Inlandboatmen's Union of the Pacific, and District 28 of the United Steelworkers of America, who also operate on the inland waterways.

I'm pleased to have this opportunity to discuss the Coast Guard's regulatory proposal that establishes testing requirements to detect drug and alcohol use among merchant vessel personnel.

As individuals, we share our Nation's concern about the drug problem, which has plagued American society and nations around the world. As representatives of thousands of merchant mariners on U.S.-flag vessels plying our Nation's domestic waterways and the sealanes of the world, we are committed to the highest standards of safety and to a drug-free working environment. That has always been our position, and it always will be our position. Drugs and maritime simply do not mix. Although we support the goal of achieving a drug-free society, and working environment, we still have serious problems with the Coast Guard's proposed drug testing program as it would be applied to our industry.

First, we question the Coast Guard's assumption that such a problem exists in the U.S. maritime sector. Second, we question the constitutionality and legality of the Coast Guard's recommended means for achieving a drug-free workplace. Third, we question the fairness of dumping an expensive testing program on an industry that is already in desperate straits. Fourth, we question how such a program can hope to be fair and effective if it applies only to U.S.-

flag vessels and not to all vessels. And, fifth, we question the unprecedented haste with which this complex issue is being pursued.

The written statement we have submitted goes into these problems and others in detail. In the interest of time, however, let me conclude by saying that we urge the Committee and the Congress to work with us to persuade the Coast Guard not to implement its proposed rulemaking regarding drug testing. Instead, the Coast Guard should note all of the problems we have cited with its proposed program, and give the industry a reasonable timeframe in which to analyze the economic impact of any federally-mandated drug abatement program, and time to propose constructive specific alternatives which can be collectively bargained by the industry's labor and management.

Any drug program must be reasonable, equitable, and fair. It should also apply to all vessels that enter U.S. waters and not just U.S.-flag vessels. It should provide constitutional safeguards and procedures and ensure fairness to the seafarer. It should impose minimal economic and fiscal impact on our industry, and it should impose the smallest administrative burden possible, while assuring that public safety is protected by having mariners aboard commercial and recreational vessels operating in a drug-free and safe environment.

I thank you, Mr. Chairman.

[The prepared statement can be found at end of hearing.]

Mr. PICKETT. Thank you very much. Does anyone else want to add anything there?

Mr. PECQUEX. I'd appreciate the opportunity, Mr. Chairman, in light of the fact that some of the issues that we may want to cover may not be raised in the question-and-answer period at this late stage.

Generally speaking, I think that the Seafarers Union and the others around the table would probably agree, that we're not necessarily objecting to the notion that the question of drug testing should be raised and studied. We're concerned more that the way in which it's being conducted is not going to lead to a full review of the problem.

The drug issue is not limited to the maritime industry, it is society's problem. Merchant mariners are just one segment of American society. No matter which way you cut us, fore to aft, port to starboard, we're still going to show up the same way as most other people do. As such, we recognize that there is a need to look at the drug issue. The need to go about this in such a hasty fashion as is planned by the Department of Transportation has not been clearly established. Many of the witnesses who testified before the Subcommittee today have indicated similar concerns about the process. They too think that the Coast Guard is going about it in an unscientific fashion. We, too, could utilize unscientific approaches to present a case against drug testing. For example, if management felt that drug abuse represented a significant problem aboard ship thereby posing potential liabilities, it would have represented something that required immediate resolution. Although testing proposals were considered during our last round of contract negotiations, no final resolution of the issue was reached. It would seem natural to assure that drug abuse doesn't pose a serious problem to the industry. The same paint was made by several of the management witnesses who testified earlier today.

The process problems are there. The haste cannot be denied. The concerns that Karl Landgrebe raised over the legal questions and the cost of the program are legitimate. They've also been addressed by other witnesses today, and I think that they should be given full weight by DOT and the Coast Guard in the rulemaking process. I think that in terms of trying to resolve the question of testing, the collective bargaining process is going to permit all of the unions represented at this table to work out many of the problems that have arisen over the question of drug testing. And it will be done in a fashion that will not necessarily be detrimental to the workers themselves.

I do think that Federal guidelines probably are going to be needed in some areas to ensure uniform treatment of workers throughout the industry. And that includes the offshore oil industry, the fishing industry, the deep- and shallow-draft marine segments. And I think that one of the important things that should be a part of the rulemaking process is that the testing of an individual should not be used for purely punitive purposes. Drug testing should be done in such a fashion to identify a problem so that we can get into the more important issue of eliminating a dependency through a commitment to rehabilitation.

We have, over the years, recognized the problems associated with substance dependency among our membership. The Seafarers Union established an alcoholic abuse center about 12 years ago. That program has now been designed to include drug and substance abuse. So, the need to identify personal addiction and reduce harmful dependencies has been recognized within our industry. Steps also have been taken to correct them.

Some people have raised concern about the costs an industrywide testing and rehabilitation program. We know the rehabilitation process is an expensive one. I think it's 75 percent of what the Coast Guard projects. I'm afraid that rehabilitation aspects of the proposed rulemaking may get lost in the shuffle. Sadly, there's a great cry to test people for drugs, but I don't hear as much of a human cry about the rehabilitation of the individual.

And, again, I believe that maritime unions have enough collective strength to bargain with our operators to ensure that we established fair testing and meaningful rehabilitation programs. I fear, however, that rehabilitation, which we think is an integral part of the drug elimination process, will be demoted and perhaps even ignored in the rulemaking process.

I thank you, Mr. Chairman.

Mr. PICKETT. All right. Thank you.

Anyone else want to comment? This issue of the agreement between the unions and the companies concerning this issue, how far has that progressed? Are there some agreements in effect that do bear on the issue of testing?

Mr. LANDGREBE. I'd like to comment on that, Mr. Chairman. Yes, speaking for District 1 NMEBA/National Maritime Union, we recently came to agreement with our liners and bulk cargo operators who belong to the MSC and TSC group of companies; and, basically, not all the i's dotted or t's have been crossed as of yet building in safeguards, et cetera. But we do have an agreement. We will have drug testing.

No one will be dispatched from our hiring hall to a vessel without a drug-free certificate. He will have taken a test before he gets to that vessel. And he will have periodic updates on that. In addition to that, there will be testing for reasonable cause, done again with safeguards. And a third part of that, which we think is very important and is one of the reasons that we were able to, I think, come to terms with the company, is that we have agreed to work to try to get our U.S. Government to go to the International Labor Organization, the International Maritime Organization, the various international bodies and try to come up with a standard to keep the foreign-flag ships that do not have a program out of our waters. There's no sense taking 4 percent of—which we perceive to be no danger, and testing them, and allowing 96 percent who are not tested, and we perceive to be a danger from experience, and just letting them go with nothing.

Now, we're not holding the testing program up for that; we are implementing the testing program. But that is part of what we've agreed with the companies in order to make what we feel is a safe workplace for ourselves and the people that use the water around it.

Mr. **Pecquex**. Mr. Chairman, I would also like to comment on current plans. We have a training school in Piney Point, Maryland, where we have an entry level program which is designed to bring in people who are probably in the high risk areas for potential drug abuse in terms of chronological groups. They are young men and women 18 to 24 who have never sailed before. They can be given an opportunity to enter into the industry. We have made drug screening a part of the application process. And it's made clear to those who are going to apply that they have to be free of drug use.

Another point that was emphasized in the joint statement and Karl Landgrebe has also addressed it too: the notion of extending drug testing to foreign-flag vessels I think is a legitimate one. We have one contracted company which transports liquefied natural gas between Indonesia and Japan. The Japanese Government put pressure on the company to institute a drug testing program aboard its eight vessels. Now, on every trip the eight LNG vessels that are in the trade make, the members of the crew are subjected to random testing which was collectively bargained with the unions. So, if it's good for the Japanese to impose drug testing on foreign vessels for their own safety and security, I think the United States Government should also be inclined to do likewise.

Mr. **Pickett**. All right.

Again, gentlemen, there may be some points we've overlooked, and we may want to submit some written questions to ask your response for the record. If you would cooperate, we'd very much appreciate it. I want to thank you very much for your appearance here today. Your testimony is very helpful, and we appreciate so much your taking the time to be with us. Thank you.

Mr. **Landgrebe**. Thank you.

Mr. **Pecquex**. Thank you, Mr. Chairman.

Mr. PICKETT. Ladies and gentlemen, there's another hearing scheduled for this room. If you could help us by promptly leaving, we'd appreciate it.

The Subcommittee is adjourned.

[Whereupon, at 1:50 p.m., the Subcommittee was adjourned, to reconvene at the call of the Chair.]

[The following was submitted for the record:]

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DUNCAN C SMITH III

September 19, 1988

TO: MEMBERS, SUBCOMMITTEE ON MERCHANT MARINE

FROM: Majority and Minority Staff

SUBJECT: Oversight Hearing on Proposed Coast Guard Rule Governing Drug Testing of Merchant Mariners (Thursday, September 22, 1988)

At 9:30 a.m. on Thursday, September 22, 1988, the Subcommittee on Merchant Marine will conduct an oversight hearing on the proposed Coast Guard rule to test merchant mariners for drug and alcohol use. The hearing will be held in Room 1334, Longworth House Office Building. Witnesses will include representatives of the Department of Transportation, the National Transportation Safety Board, the American Civil Liberties Union, vessel operators, and maritime labor.

THE PROPOSED RULE

On July 8, 1988, the Coast Guard issued a Notice of Proposed Rulemaking (NPR) in the FEDERAL REGISTER (53 FR 25926) to begin random, mandatory testing of merchant mariners on U.S.-flag vessels for drug use and alcohol abuse. The stated goal of the testing program is to "foster a drug and alcohol abuse free transportation environment which will continue to merit public confidence."

If implemented, it would cover any person who works on a U.S.-owned vessel on which there must be at least one Coast Guard-licensed person. It also contains a provision that a person accepting a shipboard job "impliedly consents" to be tested. The rule would not apply to foreign-flag vessels operating in U.S. waters or calling at U.S. ports.

The testing program would operate as follows:

(1) **Preemployment Test.** Every person applying for a job on a vessel described above would be tested.

(2) **Random Test.** All personnel on vessels would be subjected to random tests. The average number of tests per employee would be no more than 1.25 per year under the proposal.

(3) **Periodic Test.** All individuals who must renew Coast Guard licenses would be tested when they do so, and also when they are required to take physical examinations for their jobs. This would be administered by the group doing the testing.

(4) **Reasonable Cause Test.** If an employer has a "reasonable and articulate belief" that an employee is using drugs, he may test the employee.

(5) **Post-Accident Test.** Under current law, marine employers must determine whether drug or alcohol use was involved in an accident. However, the determination may be made by observation, if desired. The new proposal will require chemical testing after an accident -- but only if it is a "serious marine accident."

A person who tests positive for drug use would be ineligible for employment on a vessel until he completes rehabilitation. Four options for rehabilitation eligibility are proposed:

(1) employees testing positive would be eligible for rehabilitation;

(2) employees testing positive would be eligible for rehabilitation, except those caught by a Reasonable Cause Test (#4 above) or a Post-Accident Test (#5 above);

(3) only those who voluntarily admit to drug use would be eligible; and

(4) no one would be eligible.

The proposal does not outline a specific rehabilitation program, but suggests that a mariner would be able to regain documents and employment upon the completion of some type of program (such as in-patient rehabilitation) and a period of monitoring.

The total cost of the proposed policy is estimated by the Coast Guard to be a maximum of $62.3 million for the first year. It is proposed that private companies would be responsible for paying for the program.

CURRENT REGULATIONS AND LAWS REGARDING DRUG USE

The use of "dangerous drugs" by merchant seamen is addressed in sections 7503 and 7704 of title 46, United States Code. Section 7503 provides that seaman papers may be denied to a person who has been convicted within the previous ten years of violating a drug law, or who has ever used a dangerous drug, unless satisfactory proof is offered that the individual is cured. Section 7704 allows for the revocation of seaman papers for the same reasons. Presumably, these statutory provisions would operate independently of the available actions in the proposed rule.

DRUG RULES IN OTHER TRANSPORTATION MODES

As part of its "War on Drugs," the Administration has instituted drug testing programs for many of its agency employees. Further, the Department of Transportation is in the process of promulgating rules on drug testing of privately-employed workers in virtually all transportation modes -- including airlines, railroads, trucking, mass transit, and pipelines.

In related efforts, both the Coast Guard and the Customs Service have increased pressure on the owners of vessels to ensure that no drugs are entering the country on board vessels under their control. The Coast Guard's "Zero Tolerance" policy was responsible for the widely publicized seizures earlier this year of yachts carrying trace amounts of drugs. The Customs Service has levied enormous fines (as required by Federal law) on common carriers whose containers were found to have drugs inside. The upshot of these policy initiatives is that private industry is now bearing a greater burden of stopping the flow of drugs into the country.

CONCERNS OVER THE DRUG TESTING PROPOSAL

A number of concerns are presented by the Coast Guard's drug testing proposal. First is the Coast Guard's acknowledged lack of adequate data about drug and alcohol problems in the merchant marine. Evidence is presented in the NPR that indicates that "intoxicants" accounted for 75 deaths, 52 injuries, and $6.5 million in property damage between 1981 and 1986. During the same time period, the Coast Guard took suspension actions against 89 seamen for alcohol-related offenses and 134 seamen for drug-related offenses.

Coast Guard data indicate that, for the period 1981-1986, 660 confirmed drug- and alcohol-related fatalities took place on recreational vessels -- although the Coast Guard estimates that approximately one-half of all recreational vessel fatalities can be traced to drug or alcohol abuse.

A second concern is that the estimated cost of the program -- $62.3 million -- is to be borne by the private sector. A number of groups believe that the actual cost might be significantly higher. The fact that foreign vessels calling at U.S. ports are not required to participate in the program adds a further burden to the U.S.-flag merchant marine vis-a-vis its foreign competitors.

Third, the rights of individuals to be free from unreasonable search and seizure under the Fourth Amendment might be violated by this rule. In a related case, the Ninth Circuit Court of Appeals ruled earlier this year that the Federal Railroad Administration's rule mandating post-accident testing violates an employee's Fourth Amendment rights. The decision is scheduled to be reviewed by the Supreme Court this Fall.

Fourth, the validity of test results has on many occasions been called into question, and an erroneous positive reading could have the effect of falsely "branding" a seaman as a drug user. On March 25, 1988, the House Committee on Government Operations issued a report titled, "Failing the Test: Proficiency Standards Are Needed for Drug Testing Laboratories." The report found that individuals required to take drug tests are not assured that their specimens will be analyzed by laboratories meeting acceptable standards of proficiency. In addition, many employers use only screening tests to determine drug use, and do not follow up with more sophisticated and accurate confirmatory tests when a positive result is reported.

The report also found that, while the many drug testing laboratories in this country vary widely in their range of expertise and proficiency, there are no Federal requirements (and only a small number of State requirements) that labs be certified to perform accurate substance abuse tests.

A fifth concern is the lack of flexibility inherent in the proposed rule. Initial responses by a number of vessel operators indicate that individual companies should be allowed to judge what type of drug testing program is suitable for them -- rather than be forced to adhere to a rigid, homogenous regulation. Moreover, many companies and unions have drug testing programs and voluntary rehabilitation programs for their employees and members.

Finally, many organizations that would be affected by implementation of this rule have expressed concern over the short timeframe available for public input -- especially considering the length of the NPR and the divisiveness and controversy surrounding the issue. (The NPR was published July 8, 1988, and the comment period ended September 6.)

COAST GUARD'S AUTHORITY TO PROMULGATE DRUG RULE

The Coast Guard cites the following statutes as giving it jurisdiction over the subject area:

(1) 46 U.S.C. 2302 provides penalties for negligent operation of vessels;

(2) 46 U.S.C. 7503 provides for denial of merchant mariner's documents to an individual who has used drugs;

(3) 46 U.S.C. 7704 provides for mandatory revocation upon a showing of drug use -- unless the individual proves he is cured; and

(4) 46 U.S.C. 7703 provides for suspension or revocation of merchant mariner's documents.

The Coast Guard also cites 46 U.S.C. 7003 (nothing in title 46 has this section number; presumably, section 7703 is the intended cite, which provides the basis for revocation of documents) as authority for deeming that any individual accepting employment on a vessel impliedly consents to chemical testing.

The Coast Guard cites the following statutes as authority for requiring random sampling:

(1) 46 U.S.C. 2103 gives the Secretary of Transportation general superintendence authority over the merchant marine of the United States and merchant marine personnel, as well as regulatory authority to implement subtitle II of title 46;

(2) 46 U.S.C. 3306 gives the Secretary authority to prescribe regulations generally regarding the design, construction, equipment, and other particulars of vessels;

(3) 46 U.S.C. 7101 provides a general framework for the issuance of licenses to merchant marine personnel. In the case of pilots, the applicant for a license must be in sound health, have an annual physical exam, and meet any other requirements the Secretary considers reasonable and appropriate;

(4) 46 U.S.C. 7301 gives the Secretary authority to prescribe regulations to carry out chapter 73 (Merchant Mariners' Documents) of title 46 and defines "service on deck," among other things; and

(5) 46 U.S.C. 7701 provides general authority to suspend or revoke merchant mariner's documents.

The Coast Guard cites the Coast Guard Authorization Act of 1984 (Public Law 98-557; final rule published in 52 FR 47526, December 14, 1987, "Operating a Vessel While Intoxicated") as giving it authority to require post-accident testing of individuals involved in marine casualties. Although that rule allows for a choice of testing or personal observation, the Coast Guard -- in its present NPR -- would require testing in those marine accidents that involve "death, injury, or significant property or environmental damage."

The Coast Guard further cites the following statutes as authority for its NPR:

(1) 33 U.S.C. 1231 provides general regulatory powers to the Secretary in carrying out chapter 25 (Ports and Waterways Safety) of title 33;

(2) 43 U.S.C. 1333 extends U.S. jurisdiction to structures on the Outer Continental Shelf;

(3) 46 U.S.C. 103 -- a law repealed in 1980;

(4) 46 U.S.C. 2306 requires a vessel operator to report a possible lost vessel to the Coast Guard;

(5) 46 U.S.C. 6101 directs the Secretary to prescribe regulations requiring a vessel operator to report a marine casualty;

(6) 46 U.S.C. 6301 gives the Secretary general investigatory authority following marine casualties;

(7) 46 U.S.C. 6305 directs the Secretary to prescribe regulations regarding the form and manner of reports of investigation;

(8) 49 U.S.C. 1903(a)(1)(E) directs the National Transportation Safety Board to investigate major marine casualties in accordance with regulations developed jointly by the NTSB and the Coast Guard; and

(9) 50 U.S.C. 198 pertains to requisitioned vessels.

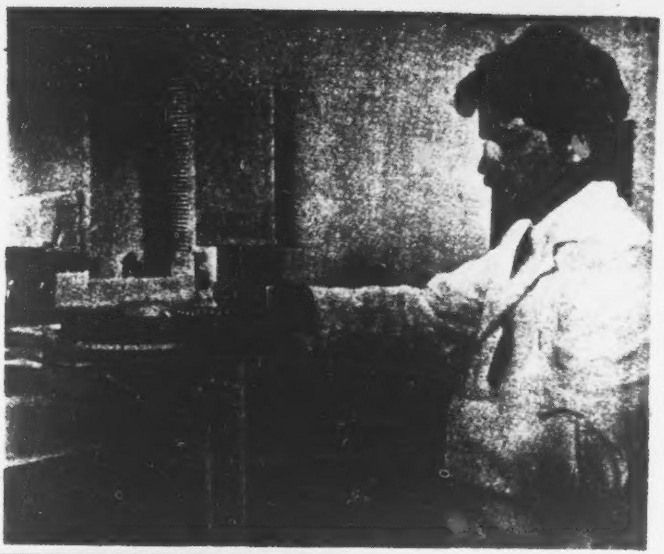
Members may be aware of further concerns regarding the proposal.

STAFF CONTACTS:
Majority: Cyndy Wilkinson/Greg Lambert, x63500
Gerry Seifert/Mark Aspinwall, x56785
Minority: Kip Robinson/Rusty Johnston, x63492

Enc: TRAFFIC WORLD Article, September 5, 1988,
"Focus: The Drug Testing Dilemma"

cc: Members, Committee on Merchant Marine and Fisheries

TRAFFIC WORLD
SPECIAL REPORT



FOCUS: THE DRUG TESTING DILEMMA

by Jean V. Murphy

Any possibility that the federal government would take a moderate approach to rules mandating urine drug testing in the transportation industries died on Jan. 4, 1987, along with 16 victims of the Chase, Md., Conrail-Amtrak crash.

The Federal Railroad Administration's year-old rules concerning "reasonable suspicion" and post-accident testing of rail workers—the strongest such rules then in effect—did not prevent Conrail engineer Ricky L. Gates and brakeman Edward W. Cromwell from smoking a marijuana cigarette after pulling out of the terminal that Sunday.

Gates subsequently ignored a warning signal, and failed to respond quickly enough to a stop signal. The Conrail freight train he was engineering rolled through a switching station and entered the northbound track just minutes ahead of an Amtrak passenger train traveling at 125 mph. The amtrak engineer and 15 passengers, including several college students returning from Christmas vacation, were killed in the resulting crash. Nearly 200 others were injured.

The National Transportation Safety Board concluded that Gates' failure to stop his train "as a result of impairment from marijuana" was one of the principal causes of the accident.

The public outcry following this tragedy was enormous and intensified widespread fears that drug abuse in the transportation workplace has undermined safety and jeopardized lives.

Congress and the Department of Transportation responded quickly to that concern. A bill mandating random drug tests in the rail, air and motor carrier industries was introduced almost immediately by Sens. Ernest F. Hollings, D-S.C., chairman of the Senate Commerce Committee, and John C. Danforth, R-Mo., ranking minority member.

Then Transportation Secretary Elizabeth Hanford Dole, acting with equal speed, announced that stringent rules encompassing random testing would be issued by DOT for all modes.

The Danforth-Hollings bill, S. 1485, passed the Senate, but has been bogged down for months in a conference committee deadlocked over several issues. Passage this year is doubtful.

DOT has moved ahead with its drug testing agenda, however, and issuance of final rules before the end of the year seems certain. Secretary Jim Burnley made this issue his "top priority" after taking office last December and has promised "absolutely" that final regulations will be out this fall.

The first set of proposed rules, for the airline industry, was issued by the Federal Aviation Administration in March. Over the next four months modal administrations governing the rail, truck and bus, pipeline, merchant marine and mass transit industries followed with similar measures. All adopt the Administration's policy of zero tolerance and prohibit any use of five frequently abused drugs, either while on or off-duty. Drugs covered are marijuana, cocaine, phencyclidine (PCP), amphetamines and opiates.

Testing is proposed as a part of preemployment screening, during required periodic physical exams, after serious accidents or incidents, for reasonable cause, and on a random basis. Random tests would be conducted at a rate of up to 125 percent, meaning that every employee would have a good chance of being tested once every nine months. Some degree of rehabilitation would be required for employees testing positive.

(Rail rules apply to random testing only. Earlier regulations concerning drug and alcohol testing after accidents and for reasonable cause were overturned by the 9th U.S. Circuit Court of Appeals and are now being reviewed by the U.S. Supreme Court.)

The requirements would cover an estimated 4-6 million employees and cost the affected industries billions of dollars—an expense that would quickly be reflected in higher freight rates.

The goal of the rules—a drug-free transportation system—is universally supported. There is substantial disagreement, however, as to whether DOT's approach is the best way to achieve that end.

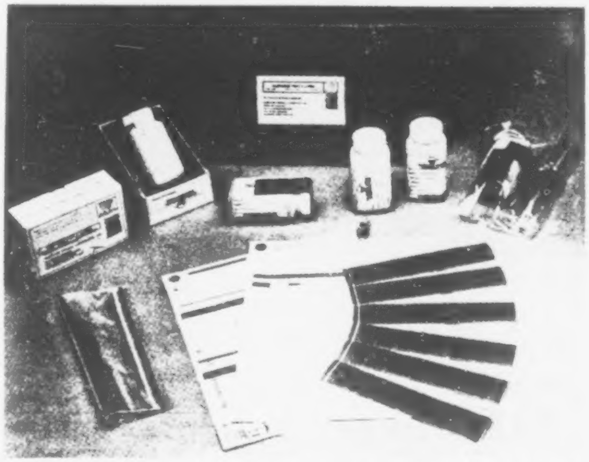
Random testing controversy. Areas of contention include the accuracy and reliabilty of urine tests; which employees to cover; the treatment and discipline of those who test positive; the confidentiality of test results; protection from employer harassment; costs of the program; and privacy issues.

By far the greatest controversy, however, concerns the effectiveness, fairness and feasibility of random tests.

Unions and employee groups are especially unhappy with the random aspects of the proposals. In addition to constitutional issues, now before the Supreme Court, these protestors say DOT has not shown a need for random tests, or proved that this tactic would be an effective deterrent.

"There is no evidence of widespread drug use among classes of employees to whom the regulation would apply, nor is there any evidence that such drug use as might exist cannot be discovered without random testing," said Henry A. Duffy, president of the Air Line Pilots Association.

Duffy accused the Administration of "latching onto random testing as an ex-



Urine collection kit used by Maryland Medical Labs includes chain-of-custody documents and tamper-proof seals.

pedient political gimmick in an election year."

"It is a classic example of the old saying that for every problem there is a simple, elegant and easily understood solution—that also just happens to be wrong," he said.

R.V. Durham, director of safety and health for the Teamsters union, also contends that "DOT just doesn't have the data or studies to support this kind of action."

"If we had petitioned DOT with the kind of evidence they are offering in this rulemaking, we would be laughed out of the room," he said.

Teamster drivers are tested for drugs during their biennial DOT physical. Durham notes that drug use has been detected in only .05 percent of those tested. "There is just nothing to suggest that the drug abuse problem is severe enough to warrant such a broad-brush, and potentially unconstitutional, approach," he said.

While admitting that available data are "sparse and inconclusive" in most instances, DOT argues that there is no reason to believe that drug use among transportation workers is any different than among society in general. It cites **figures from the 1985 National Survey on Drug Abuse which indicate that 22 percent of workers aged 18 to 25, and 6 percent of those over age 26 said they had used marijuana in the past month. The figures for cocaine use in the past month were 8 percent for workers aged 18 to 25 and 9 percent for those over age 26.**

DOT also notes that in pre-employment tests, now being performed by most transportation companies, positive test results are running from 20 to 40 percent of applicants who would otherwise be hired.

And, the department says, railroad industry data, collected under FRA's earlier testing rules, provide persuasive evidence that drug use is serious enough to warrant random testing.

FRA reports, for example, that between Feb. 10, 1986, and Dec. 31, 1987, mandatory post-accident testing was conducted after 3,490 qualifying events. A total of 1,508 employees were tested. Ten of these employees, or .7 percent, tested positive for alcohol and 66, or 4.4 percent, tested positive for a controlled substance. An additional 12 employees tested positive for prescription drugs.

"This result is encouraging to a degree, **since it is below many previous estimates of drug use prevalence, notwithstanding the fact that drug users would be expected to be overrepresented in the population sampled," FRA said. "However, a 4.4 percent positive figure is not an acceptable figure."**

DOT also points out that random checks provide the only means of identifying workers who are able to cloak their use and to avoid testing until an accident occurs. "A person who knows they are going to be tested during a periodic physical can lay off for a week or two, slide by, and then start using drugs again the next day," said Janet Hale, DOT assistant secretary for budget and programs. "We could end up facing the same kind of situation we did in Chase, Md., and we are just not willing to take that risk."

Employee groups and civil libertarians argue, on the other hand, that random selection also identifies and stigmatizes productive workers who use drugs "casually," in the same manner as the executive who has a few martinis at a Saturday night cocktail party. Since urine drug screening can only identify past drug use, and results cannot be directly correlated to impairment, opponents say workers should be tested only when their behavior or on-the-job performance indicates that a problem may exist.

"We object to subjecting off-duty conduct to random testing," said Lawrence M. Mann, attorney for the Railway Labor Executives' Association. "One's private actions which have no effect on safe job performance are not a legitimate concern of the government nor the public."

DOT disagrees, arguing that both on-duty and off-duty drug use affects critical performance skills and contributes to an employee's overall fitness for duty. It cites a study in which pilots, tested on a flight simulator the day after ingesting marijuana, showed "reduced performance on complex, divided attention tasks."

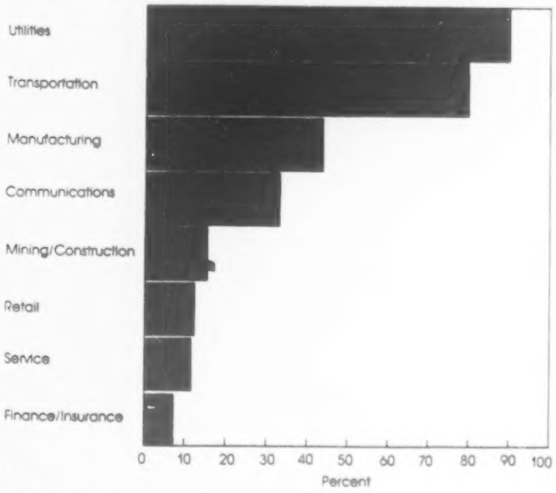
"This is no time for tolerance or moderation or compromise," said Transportation Secretary Burnley. "There is nothing 'recreational' or 'casual' about what drug abuse has done to this country."

Jeffrey A. Norris, president of the Equal Employment Advisory Council, agrees. He said the contention that a drug screen does not show current impairment has too often succeeded in "muddying the waters."

"In a safety sensitive industry, employers are entitled to use reliable evi-

Companies That Currently Test

Percent of companies that currently conduct pre-employment drug tests



Source: National Institute on Drug Abuse

[redacted]

dence of past illicit drug use as the basis for choosing not to risk that an individual will repeat past behavior and become impaired at a future time," he said.

Do random tests deter use? Hard data on the deterrent effect of random tests are also sparse, since only a handful of companies have instituted random testing programs. According to Business and Legal Reports, a research organization, only 1 percent of companies test employees on a random basis, while nearly a quarter of those with 500 or more employees conduct pre-employment drug screens.

This leaves only the experience of the military from which to draw, and DOT relies heavily in its proposals on the record of the Coast Guard. After implementing random testing in 1983 at a 125 percent sampling level, the Guard reports that confirmed positives dropped from 103 per 1,000 to 29 per 1,000.

While these figures are impressive, opponents question the reasonableness of translating the military's experience to the private sector, especially to an industry such as transportation, with its large, frequently unsupervised workforce.

"The trucking industry is not the all-volunteer Army," said Marshall Siegel, president of the Independent Truck Owner-Operators Association. "Ordering a recruit over whom the Army has complete control to take a drug test is very different from ordering an independent businessman who owns and operates his own truck to do so."

Skeptics also doubt industry's ability to manage and pay for a random testing program at a level high enough to have a significant deterrent effect. "The only way to have a testing program really work is to test frequently enough so that an employee believes his chances of being caught are greater than not being caught," commented Ted Schramm, president of Behavior Research, San Diego, Calif. "Otherwise, workers will simply play Russian Roulette and try to beat the system. You'll have a lot of companies in the business of collecting urine, but you really won't accomplish much."

Finally, opponents assert that testing programs without random checks, coupled with education and a strong rehabilitation and intervention program, are more effective and far less costly—both in terms of money and the abrogation of individual rights—than a random program.

They point to the highly successful peer intervention and rehabilitation efforts in the railroad and airline industries that have substantially reduced alcohol abuse. Operation Redblock, a rail program, and the airlines' HIMS (Human Intervention Motivation Study) program have both been expanded to deal with drug-related problems.

"Before something as constitutionally suspect, hugely expensive, and of such doubtful value as random drug testing is tried, the industry should be permitted to continue to utilize the HIMS approach to the drug-abuse problem," said ALPA's Duffy.

Even the National Transportation Safety Board, a strong advocate of a drug-free transportation system, has attempted to dissuade DOT from imposing random tests. NTSB endorses the approach of the Southern Pacific Transportation Co., which dramatically reduced human error accidents by imposing a strong "for cause" testing program that covers all safety-sensitive employees and that requires testing for a wide range of incidents and rules violations.

"The safety board believes the Southern Pacific's is a reasonable and apparently effective approach to the problem that should be tried before measures such as random testing are implemented," it said.

It should be noted, however, that SP uses its figures to support random tests. The railroad reports, for example, that in 1987 tests of workers returning from furlough or other periods of extended leave resulted in 55 positives: six for alcohol, 23 for marijuana, 24 for cocaine, and one each for amphetamines and PCP. This, despite the fact that the workers had at least a 30-day notice that the test would be given.

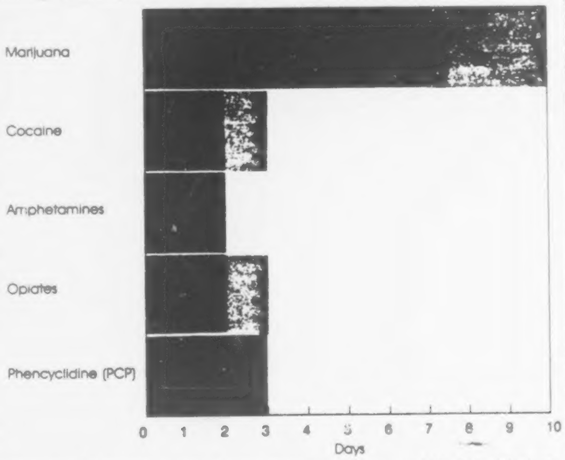
"It is apparent to the Southern Pacific management that additional measures must be considered to deter the use of drugs both on and off the job," said Orville J. Pilcher, assistant to the senior vice president—operations.

DOT clearly agrees; while the Supreme Court may have the last word on this subject, no one expects the agency's final rules to abandon a random testing mandate.

Implementation problems. The question then becomes how best to fairly implement random testing among diverse transportation companies. Perhaps the greatest challenge in this area is presented by the highly decentralized trucking industry. Not only is there a huge number of drivers to be tested (3 to 5 million), but many of them own and

Average Drug Detection Life

Average* detection life of the five drug groups for which DOT would mandate testing



*Detection life depends on size of dose, regularity of use, and individual physiological factors.

Source: Maryland Medical Labs

FOCUS:
THE DRUG TESTING DILEMMA

operate their own vehicles and cannot reasonably be expected to test themselves.

The Federal Highway Administration suggests that these independent drivers, and small companies with only two or three vehicles, get together to jointly develop random testing programs. Since these drivers are almost constantly on the road and would have no regular contact with such an organization, however, they would apparently have to be contacted in advance to arrange a test, eliminating the vital element of surprise.

Owner-operators themselves suggest a program under which they would be required to carry a card, similar to the DOT medical fitness card, which would certify that they were tested for drugs on a specific date with negative results. The card would be good for a limited period, perhaps six months. It could also be used to satisfy pre-employment test requirements for independents who continually "trip-lease" to different carriers for short periods of time.

While this approach has advantages, it is a periodic, rather than a random, test.

The American Trucking Associations insists that the only way to have true random tests, where all drivers would have an equal chance of being selected, is to perform the tests through roadside vehicle and driver checks conducted under the Motor Carrier Safety Assistance Program.

"The MCSAP program already tests the vehicle, the load, and the driver's license and logs," said Will Johns, ATA vice president for safety. "Including drug testing during a driver inspection is a logical next step."

Johns says it would not be very difficult to train a state inspector in the proper collection and chain-of-custody procedures provided for in the proposed rules for drug tests. This person could staff a "collection station," perhaps in a converted trailer, that would be set up adjacent to a roadside inspection point. Every "nth" driver would be required to provide a specimen that would be sent to a testing lab.

Assuming this could be accomplished satisfactorily, questions would remain about the fate of those drivers whose tests later come back positive. If they are employed by or leased to a company, follow-up action would not be a problem. There would be no way of knowing how to contact an independent driver, however. Suggestions that drug test results be included in these drivers' permanent driving record would open a Pandora's Box of privacy issues.

Also, there is a concern that drivers who use drugs would simply avoid the check points, as they frequently do now when operating overloaded. The location of roadside checks is spread quickly through the CB grapevine.

"We know there are problems, but we think they can be worked out," said Johns. "The bottom line is that ATA cannot support a mandatory random testing program which does not put all drivers at equal risk of being tested, and we think roadside testing offers the only way to do that."

Logistics involved in testing merchant seamen also present unique problems. Since ships can be away from American ports for up to three months at a time, carriers will be required to have someone on board trained in collecting urine samples, and a refrigerated, secure area in which to store the specimens pending lab analysis.

"This will create all kinds of difficulties," said A.E. May, director of the U.S. Shipowners Association, "and it is just one of the problems we have with these regulations. We think they are unnecessarily complex and expensive and have been rushed out with too little thought to their impact or consequences. DOT is just moving too fast."

How many tests? The number of random tests that carriers will be required to conduct is also an issue. Based on the Coast Guard's experience, DOT seems to favor 125 percent. This means that a company with 500 employees would have to conduct 625 random tests a year, or 52 each month.

The Association of American Railroads says this level is too high. It recommends that each carrier be permitted to establish its sampling level at any point above a minimum of 15 percent of the work force. Random tests would have to represent only 5 percent of the total, with other "short-notice" tests, such as those for reasonable suspicion, making up the difference.

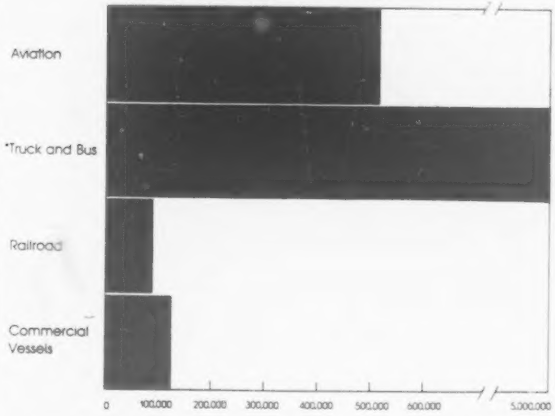
"The percentage need only be high enough to convey a reasonable expectation to each covered employee that he or she may be tested," AAR said.

The Air Transport Association recommends the sampling rate be set initially at 50 percent of the testing pool, and be increased if "subsequent data reveal that this level is not effectively deterring drug use."

Experts generally agree that a high percentage is essential for significant

Number of Workers to be Tested

Number of workers covered by U.S. Department of Transportation
Proposed rules on drug testing



*Assumes final rule applies to all interstate drivers of vehicles with a gross vehicle weight rating of 10,000 pounds or more. If a 26,000 pound gvw is used, the number of affected workers would be about 3,000,000.

Source: U.S. Department of Transportation

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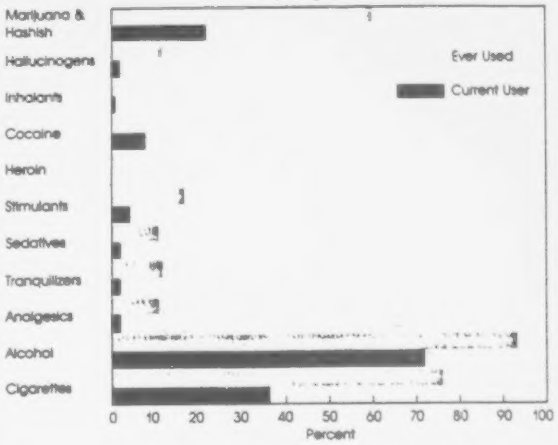
THE DRUG TESTING DILEMMA

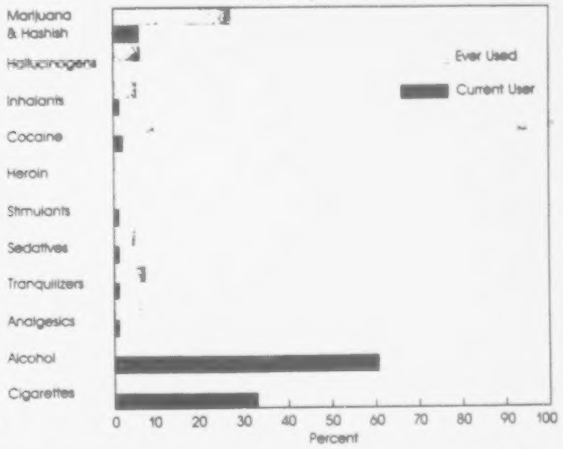
Drug Abuse Statistics

The following are estimates of the number of people in two age groups who report they have used drugs nonmedically. Drugs used under a physician's care are not included. The estimates are rounded and were developed from the *National Household Survey on Drug Abuse, 1985*, for the National Institute on Drug Abuse by the Institute for Survey Research, Temple University.

18-25 years (pop. 32,490,000)



26 + years* (pop. 136,660,000)



*Population estimates for this age group are weighted averages of the estimates for the 26-34 year old and 35+ year old age groups.

Terms:
Ever Used: used at least once in a person's lifetime.
Current User: used at least once in the 30 days prior to the survey.

deterrence. "If you are serious about attacking the drug abuse problem through testing," Schramm said, "the sampling percentage should probably be at least 200 or 300 percent."

"No one knows what the magic number is," he said, "but we know that people do not change their behavior unless they believe there are real and imminent consequences. It is just like driving on the highway. You don't slow down until you see the black-and-white."

Other types of tests. Reasonable suspicion and post-accident tests, while less controversial than random checks, also worry employees.

Generally, labor supports specific post-accident criteria that require tests only for those employees who could reasonably be construed to have contributed to the event, and whose behavior raises reasonable concerns about impairment. The issue of "individualized suspicion" in post-accident tests is one of the questions now being reviewed by the Supreme Court.

The motor carrier industry has asked DOT to leave post-accident testing to the discretion of law enforcement officers on the scene. Labor and management agree that it is unreasonable to place the responsibility for these tests on management since many accidents occur thousands of miles from a carrier's home base and the testing must be accomplished within a short time frame.

Reasonable suspicion testing has the greatest potential for employer abuse and more stringent guidelines are needed, labor says. DOT's requirements that two supervisors approve the test demand, and that they put their reasons in writing, are seen as providing insufficient protection.

"Given the current hostile relationship existing between management and labor in the airline industry, it is not hard to imagine how such a drug testing process could easily result in wholesale violations of constitutional and human rights," said Atlanta attorney William J. Wirth.

Independent trucker advocate Marshall Siegel sees the same potential in the trucking industry. "This is placing a coercive device in motor carriers' hands," he said. "For instance, should a driver turn down a load, reasonable cause testing might be immediately suggested by the dispatcher as a way of retributive harassment. These types of abuses are all too common."

Rocognizing this potential, DOT is considering limiting the number of times an employee can be subjected to reasonable cause testing.

[redacted]

Testing accuracy. Underlying all of these testing situations are serious doubts surrounding the viability and reliability of the tests themselves.

These concerns are not without basis, and were underscored by last year's scandal at DOT's testing lab in Oklahoma City.

The FRA sent blood and urine samples from crew members involved in the Chase, Md., wreck to the Civil Aeromedical Institute (CAMI) laboratory to be screened for drugs and alcohol.

Inconsistencies in CAMI's test results and documentation prompted an investigation of the lab a month later by the Inspector General of DOT. The lab was subsequently closed, and the biochemist in charge of testing was relieved of his duties. He later pleaded guilty to federal felony charges of providing false information to the FRA.

In its report on the accident, the NTSB said the lab lacked the sophisticated equipment needed to confirm positive tests until late in 1986, and no one in the lab had the expertise to use the equipment when the Chase accident tests were performed.

This lesson was not lost on DOT. The rules it has proposed incorporate very strict drug testing guidelines issued by the Health and Human Services Department. The guidelines detail procedures for collecting specimens, rigorous chain-of-custody requirements and guarantees of confidentiality.

Such precautions as requiring a photographic ID of the person being tested and having the specimen sealed and initialed in the employee's presence are designed to ensure correct identification of samples. Privacy concerns led HHS to require visual confirmation of the collection only where there is reason to believe the employee has adulterated the sample, or substituted a "clean" specimen for his own.

In response to concerns of airline attendants that specimens may be misused to test for physiological states other than drug abuse, such as pregnancy, HHS prohibits any other type of analyses or tests of urine collected under these regulations, unless required by law.

Lab certification. In addition, the rules require that all testing be done in labs certified by the National Institute for Drug Abuse. The NIDA lab certification program mandates that all urine specimens be tested under forensic conditions that are far more exacting than the clinical tests used to diagnose illnesses.

The initial screening test must be performed by using an immunoassay technique. Substances that show positive above cut-off levels established in the rules must be confirmed by gas chromatography/mass spectrometry, the most advanced method.

To achieve certification, labs must meet staff qualification and training requirements, maintain strict security, and pass continual quality control checks, including on-site visits and blind proficiency tests in which NIDA sends control specimens for testing.

"In a competent lab a false positive result should never, ever occur," said Dr. Stanley Cohan, director of toxicology testing services at Georgetown University Hospital. "The probability is that we will actually see more false negatives than positives, because the cut-off levels established in the guidelines are fairly high." The levels were established, Cohan said, to avoid any possibility of a positive reading from such things as passive inhalation of marijuana.

Information Sources

Copies of proposed drug testing rules may be obtained from the issuing agency. Requests should refer to the appropriate docket number, as listed below.

Federal Highway Administration, "Motor Carrier Safety Standards; Controlled Substances," Docket No. MC-116. Comment closing date Sept. 12. Address: 400 Seventh St., S.W., Washington, D.C. 20590.

Federal Aviation Administration, "Anti-Drug Program for Personnel Engaged in Specified Aviation Activities," Docket No. 25148, Notice No. 88-4. Comment closing date June 13. Address: 800 Independence Ave., S.W., Washington, D.C. 20591.

U.S. Coast Guard, "Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel," Docket No. CGD 86-067. Comment closing date Sept. 6. Address: Room 2110, 2100 Second St., S.W., Washington, D.C. 20593-0001.

Federal Railroad Administration, "Railroad Operating Rules; Random Drug Testing Program," Docket No. RSOR-6, Notice No. 18. Comment closing date Aug. 8. Address: Room 8201, 400 Seventh St., S.W., Washington, D.C. 20590.

The National-American Wholesale Grocers' Association has developed a comprehensive Guide to Developing a Workplace Substance Abuse Program. For information contact NAWGA, 201 Park Washington Court, Falls Church, Va. 22046.

A false positive, explains Dr. Frederick Rieders, president of National Medical Services Inc., is the result of an analytical or laboratory mistake. When a substance produces the same "fingerprint" as another substance being sought in screening, the result is properly known as a false identification.

One example, he said, is methamphetamine, or speed, which closely mimics a related and "completely innocuous" substance frequently used as a nasal decongestant. "They are very similar and could not be differentiated by the type of testing required in the regulation," he said. "Even the confirmatory tests will not pick up the difference.

For this reason it is very important for those being tested to disclose any medications they are currently taking. Drugs prescribed by a physician familiar with the worker's job responsibilities would provide an "affirmative defense" to an allegation that a controlled substance had been illegally used.

"When properly applied, the tests required will have no false positives in the sense I described," Rieders said. "But we have to bear in mind that there are 8 million substances registered with the American Chemical Society, and probably millions more in the universe, and some of those could mimic other, prohibited substances. In a given set of circumstances the chances are very slight, but when people demand absolute certainty, they are asking for something that is scientifically impossible. Absolute certainty you get in a seminary or church, not in science."

Employee assistance programs. Because no system is perfect, any testing requirement must be coupled with an effective Employee Assistance Program, DOT says. Each company affected by the rules would be required to establish an EAP either on its own or by contracting with a consultant or local community service organization.

Employee assistance would include education, training for workers and supervisory personnel and an opportunity for rehabilitation. A Medical Review Officer would be appointed to review results of the employer's drug testing program, confirm positive test results and evaluate individuals' rehabilitation needs. The MRO would also be responsible for determining when a person who completes rehabilitation could be returned to duty.

DOT proposes four rehabilitation options in its rules: for employees who come forward voluntarily or test positive in any test for the first time; for volunteers and those who test positive on periodic physicals; and for volunteers only. Under the fourth option the government would make no requirements, presumably leaving the issue to be settled at the bargaining table.

Management generally prefers option three: offering a one-time rehabilitation and reinstatement opportunity for those who come forward voluntarily. Companies should be encouraged to make rehabilitation available under other circumstances, they say, but they should not be required to do so. Neither should the government usurp their right to dismiss or otherwise discipline workers "caught" using drugs in the workplace.

Why Not Test for Alcohol?

Everyone agrees that the No. 1 drug abuse problem in society and in the transportation industries is alcohol. All of the modes have strict prohibitions against using or being under the influence of alcohol while on duty.

Why then is DOT not requiring companies to test for alcohol? There are several reasons. Because alcohol is a legal substance, merely establishing use is an insufficient cause of action. Impairment must be shown and that cannot be reliably done through urinalysis. A breathalyzer would have to be used and, to absolutely establish concentration above the prescribed cut-off of .04 percent, a blood serum analysis is required. A blood test is considered more invasive than providing a urine sample and would further complicate an already complex rulemaking.

The effects of alcohol use are generally more obvious than the effects of drug use, and obvious impairment would subject a worker to discipline under existing rules.

Alcohol as well as drug testing is called for in the Coast Guard's proposed rule for merchant seamen in post-accident and "reasonable suspicion" situations. Such testing is also required in the FRA's 1985 rules, which the agency expects the Supreme Court to reinstate.

Carriers are free to institute alcohol testing on their own, and many have. Under the Teamsters' contract with the trucking industry, for example, workers can be tested for alcohol if there is a "reasonable suspicion" of impairment.

Rail Testing Bill May Pass

A drug and alcohol testing bill applicable only to the rail industry will be voted on by the House of Representatives later this month.

The bill, H.R. 4748, was introduced by Rep. Thomas A. Luken, D-Ohio, and cleared the Energy and Commerce Committee in early August.

Although the bill requires testing under a variety of circumstances, including randomly, rail labor is not actively opposing its passage. The reason: more employee protections than are found in the Federal Railroad Administration's proposed rules.

These include guaranteed, employer-paid rehabilitation for all workers found in violation of drug and alcohol rules; application of required tests to all safety-sensitive employees, including supervisory and management positions; explicit penalties for both employers and employees who violate or abuse the testing requirements; an opportunity for an employee to have an independent test performed at a separate laboratory; and a guarantee of an employee's right to sue his employer for damages if he is deprived of rights provided in the rules.

Passage of this measure by the House appears certain, but there may be too few legislative days remaining in this session of Congress for the bill to make it through the Senate.

Meanwhile, efforts are under way to attach the drug testing proposal authored by Sens. John C. Danforth, R-Mo., and Ernest F. Hollings, D-S.C., to an omnibus anti-drug bill now being developed in the Senate. The House's omnibus drug bill, H.R. 5210, does not contain this proposal.

The Danforth-Hollings language, which covers the air, rail and truck industries, passed the Senate last year as part of an airline consumers' rights bill (S. 1485) and has been stalled in conference ever since.

Passage of either bill would require DOT to modify its proposed rules to comply with the legislative language.

Employers also object to any prescribed type of rehabilitation. A person who uses marijuana occasionally and is caught on a random test may only need a strong warning, coupled with regular, follow-up tests, they say. Others may need more in-depth treatment. In either case the decision should be made at the company level.

Labor argues that rehabilitation programs should be made widely available, regardless of whether the employee volunteers or is identified as a result of a urine test. To limit this option, they say, will mean a return to the type of "cover-up" that plagued the railroad and airline industries before they instituted alcohol self-help programs. A rail union official said experience has clearly taught that threatening an employee with the loss of his job simply pushes the substance abuser further into the closet.

Unions also claim that dismissing a worker without the opportunity for rehabilitation is simply passing on the problem.

"One of the facts of life in this industry is that if you fire a driver because of a positive drug test, there is a good chance that you are not getting a drug user out of trucking," said the Teamsters' R.V. Durham. "Chances are that all you are really doing is pushing that driver into a smaller company or into business for himself, where it is going to be that much less likely that he is going to get straightened out. So drug testing without rehabilitation really does not do much to solve the problem."

The cost is high. Complying with these extensive requirements will not come cheap. The tests alone cost in the range of $20 to $35 for an initial screen and $50 to $80 for a confirmation. Most labs offer one set price of $35 to $50 that includes automatic confirmation of any positives, but that price is going up.

To qualify for NIDA certification, labs must pay an $18,000 up-front fee, plus the additional staff, training, equipment, and security needed to maintain certification standards.

Ronald L. Raglin, head of the toxicology department at Maryland Medical Laboratory Inc., a major testing facility, said test costs will likely increase 30 to 50 percent at top labs that already meet many of the NIDA requirements. Labs that are now "low-balling" will have to increase prices 200 percent or more if they want to be certified, he said.

"There is no such thing as a free lunch in this business," Raglin said. "With a top lab you get a high degree of con-

[redacted]

fidence in the results, but you are going to have to pay for that."

"Believe me," he added, "where test results are concerned, paying now is a lot better than paying later."

Carriers must also bear the administrative expenses of running a program, time off for workers, transportation to and from collection sites, and, perhaps, a share of rehabilitation costs.

FHWA estimates that, under its broadest options, the cost to the trucking industry alone could total more than $2 billion in the first year, more than the entire industry's profits in 1987. It is impossible to guess how much of this would be passed onto shippers, but none of the affected industries are in a position to absorb this kind of expense.

"There is no question that the cost will be enormous," said Ted Schramm of Behavior Research. "The question is, will it work? And no one has the answer to that, least of all DOT."

Supreme Court To Decide Drug Testing Issues

The U.S. Supreme Court will issue important rulings next year concerning the federal government's ability to mandate drug testing.

The high court has agreed to hear two drug testing cases during its next term. The most pertinent to transportation, involves a challenge by the Railway Labor Executives' Association of the Federal Railroad Administration's 1986 rules that required drug and alcohol testing after certain serious accidents and incidents; and established guidelines for employers to follow if they chose to do "reasonable cause" testing (*RLEA v. Burnley*).

RLEA argues that requiring employees to provide their "bodily fluids" for analysis violates the Constitution's Fourth Amendment prohibition against unreasonable search and seizure by the government.

The testing requirements were upheld at the district court level, but were overturned in a 2-1 decision by the 9th U.S. Circuit Court of Appeals.

The 9th Circuit's disagreement with other appeals court rulings permitting drug testing of jockeys, customs agents and prison guards, set the stage for a Supreme Court review.

The 9th Circuit said the FRA's post-accident testing requirements were an "unreasonable" search because they were not based on a "particularized suspicion" of impairment.

To be considered a reasonable search, it said, two requirements must be met. First, there must be a likelihood that the tests would turn up evidence of drug use; and second, the testing must be related to the objectives of the search and not excessively intrusive.

The FRA rules passed the second part of the test, the court said, as "the intrusiveness of the process of testing has been reduced as much as is practical."

In the court's view, however, the rules failed to satisfy the other requirement: that there be reasonable grounds for suspecting that the individual to be tested is under the influence of drugs.

"Accidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew," the court said.

It based this view, it said, on the fact that drug testing cannot provide evidence of current intoxication (except in the case of alcohol) and cannot measure the degree of impairment.

The court did not invalidate the portion of the rules authorizing breath and urine testing on a "reasonable suspicion" basis, and it said that imposition of the same criteria on the post-accident rules would cause "no insuperable burden."

DOT disagrees, claiming that "a requirement of individualized suspicion would effectively preclude testing in the large number of cases in which alcohol and drug abusers betray no outward signs of impairment."

In its brief asking the Supreme Court to reinstate the FRA rules, the agency said the 9th Circuit failed to balance public safety considerations against Fourth Amendment concerns.

It also argues that the FRA tests were conducted as part of an employment relationship, a fact that takes on "particular force" in an industry that is closely regulated. It cites earlier cases involving jockeys and power plant workers, in which the Supreme Court has held that persons who work in regulated industries "have a reduced expectation of privacy and in effect consent to the restrictions placed upon them."

"Under the court of appeals' standard," DOT said, "the agency could not require testing—even after a major accident, involving fatalities and massive property damage—unless, in addition to the accident itself, an employee showed individualized signs of impairment."

An affirmation of the 9th Circuit opinion by the Supreme Court would effectively nullify any government mandated drug testing program, experts say.

"If the 9th Circuit is upheld, it will pretty well be the death knell for urinalysis as an effective tool in the transportation area, whether you're talking about a major national carrier or a local taxicab firm," said Jack Mason, former general counsel of the FRA.

Mason, who helped write and defend the rules at the lower court level before leaving the FRA for private practice, does not believe that will be the outcome, however.

"I think the rules as crafted satisfy the balancing test applicable to the Fourth Amendment," he said. "Individual liberties must be balanced against legitimate concerns of government, and in this case the railroads come to the Supreme Court with blood on the tracks. There is clearly a compelling case for government action."

The impact of a 9th Circuit reversal by the high court is less certain, since it will turn on whether the court sticks to the narrow facts of the case, or uses it as a vehicle to articulate broad principles regarding workers' reasonable expectations of privacy.

The likelihood of the court making a statement broad enough to preclude further court challenges is slim. Random testing, for example, is not an issue in this case, and both the Teamsters union and the Air Line Pilots Association say they will challenge the constitutionality of random tests, if they are required by DOT.

In addition, the Supreme Court could hold that FRA's "reasonable suspicion" tests do not invoke Fourth Amendment issues because they are permissive in nature, and not governmentally required. That would leave the door open to challenges of mandated "reasonable suspicion" tests, as DOT has proposed for other modes.

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 4, 5, and 16

[CGD 86-067]

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel

AGENCY: Coast Guard, DOT.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Due to the safety and health concerns associated with drug abuse by merchant marine personnel, as well as legal restrictions on drug use, the Coast Guard is proposing drug abatement programs which include periodic drug tests (urinalysis) as part of required physical exams, preemployment testing and random sampling programs for all marine employees, and post accident and reasonable cause testing. The post accident and reasonable cause portions of the program will also involve testing for alcohol use. Four options are proposed concerning rehabilitation for those individuals who are detected as drug users for the first time.

The Coast Guard is also proposing an implied consent provision for the chemical testing of license, certificate of registry, and merchant mariners document holders as well as for all individuals accepting employment on board any vessel on which licensed, certificated, or documented personnel are required.

Through chemical testing, the Coast Guard expects to discourage drug and alcohol use by merchant marine personnel, an activity which adversely impacts the users, their shipmates, the marine industry, and the public in general. Chemical testing should also reduce the potential for marine casualties related to drug and alcohol use.

DATE: Comments must be received on or before September 6, 1988.

ADDRESSES: Comments should be submitted to the Executive Secretary, Marine Safety Council (G-LRA-2/21) [CGD 86-067], U.S. Coast Guard, Washington, DC 20593-0001. Comments may be delivered to and will be available for inspection or copying between 8:00 a.m. and 3:00 p.m., Monday through Friday, at the Marine Safety Council (G-LRA-2/21), Room 2110, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593-0001, (202) 267-1477.

FOR FURTHER INFORMATION CONTACT: Mr. Sean T. Connaughton, Project Manager, Merchant Vessel Personnel Division, Office of Marine Safety, Security and Environmental Protection (G-MVP), Phone (202) 267-0229.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments. Comments should include the name and address of the person making them, identify this notice (CGD 86-067), give the specific section of the proposal to which the comment applies, and the reasons for the comment. Persons desiring acknowledgement that their comment has been received should enclose a stamped, self-addressed postcard or envelope. All comments received before the expiration of the comment period will be considered to the extent practicable before final action is taken on this proposal.

No public hearing has been scheduled, however, the Coast Guard is considering holding a public hearing on this proposal. If a hearing is scheduled, the time and place will be published in a separate notice in the **Federal Register**.

Background

Drug and Alcohol Abuse in American Society

Drug and alcohol abuse constitutes a major societal problem. Statistics compiled and reported by the National Institute of Drug Abuse (NIDA), and by media polls, indicate the use of drugs such as marijuana to be widespread. While the problem appears to be "youth centered," in that the majority of users are in the younger age categories, the problem also exists in older groups. For instance, based on random sampling and using population projections, data from the 1985 NIDA "National Survey on Drug Abuse," indicates the following:

—In the 18 to 25 age category:

—Sixty (60) percent reported using marijuana sometime during their life.

—Twenty-two (22) percent reported using marijuana within the last 30 days.

—Twenty-five (25) percent reported using cocaine sometime during their life.

—Eight (8) percent reported using cocaine within the last month.

—In the 26 and over age category:

—Twenty-seven (27) percent reported using marijuana sometime during their life.

Six (6) percent reported using marijuana within the past month.

Nine (9) percent reported using cocaine sometime during their life.

Two (2) percent reported using cocaine within the last month.

Because of statistics like the above, many members of the public have expressed concern that the use of drugs or alcohol by others may jeopardize their personal safety. There is widespread public perception that drug or alcohol abusers should not be in safety-related occupations. A May-June 1986 national survey jointly conducted by Populus Incorporated, of Greenwich, Connecticut, and Decision/Making/Information of McLean, Virginia, produced the following results:

—88 percent favored testing airline pilots and air traffic controllers.

—85 percent favored testing police and other law enforcement agents.

—81 percent favored testing bus drivers.

As the researchers indicate, the respondents believed that people who are responsible for the physical safety of others should be tested.

Another survey conducted by American Viewpoint, Inc., on August 6–19, 1986, examined the public's attitude toward drug testing and produced informative results, specifically, "by a margin of 76 percent to 22 percent, Americans agree that the drug crisis today is serious enough for mandatory testing." The American Viewpoint survey used a "forced choice" list and asked which groups should submit to mandatory drug testing. While the transportation modes, e.g., railroad, aviation, highway, marine, etc., were not included in the list, safety and health related occupations such as police and firefighters (84 percent), armed forces (81 percent), and doctors and nurses (81 percent) were at the top of the list. Another interesting fact was that 80 percent of the respondents indicated that they would participate in voluntary testing if asked to do so by their employer.

The surveys suggest that the majority of the public is concerned about drug and alcohol abuse and favors the testing of persons in certain safety-related occupations. While the bulk of drug abuse occurs in the 25 and under category and overall usage may drop as this group grows older, maturation cannot be considered a solution to the problem. The Department of Transportation in its regulatory role must operate under the assumption that the various transportation modes do not significantly differ from the overall population in terms of drug and alcohol abuse.

In February 1987, the Federal Aviation Administration (FAA) began performing drug screens in connection with periodic medical examinations required of certain safety-sensitive agency employees. As of April 22, 1988, the FAA has received reports on 25,000 FAA employees urine specimens pursuant to its periodic testing program. Specimens for 25 employees have been determined to include one or more illegal drugs. In addition, the Department implemented its employee drug testing program on September 8, 1987. As of April 22, 1988, DOT has received reports on 1651 urinalysis tests pursuant to its random drug testing program for DOT employees occupying critical safety- or security-sensitive positions. 15 employees have tested positive for illegal drugs. These employees are currently in counseling or rehabilitation programs and have been relieved of their critical safety duties pending successful completion of these programs. In addition, since the inception of the DOT program, 6 employees have tested positive for illegal drugs as a result of reasonable cause drug testing.

Drug and Alcohol Problem in the Merchant Marine

It is reasonable to assume that because there is a drug problem in society, there is also a potential drug problem in the merchant marine. However, while the threat posed to society by drug and alcohol use and abuse is diffused, the same cannot be said of the threat drugs and alcohol pose to transportation industries such as the merchant marine. Not only do personnel who use drugs and alcohol pose dangers to themselves and shipmates, they are in the position to cause, or contribute to, vessel casualties that may take human life, destroy property, and/or seriously harm the environment.

The problem in the marine industry is increased by the fact that personnel often live on board their vessels for long periods of time. What in another context might be considered "recreational" or off-duty drug or alcohol use can have a detrimental effect upon vessel safety because the vessel is frequently also where the individual lives. Intoxicated personnel cannot serve their vessel in an emergency, and pose a hazard if they attempt to perform any necessary safety-related functions.

Coast Guard data do not specifically identify the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage. However, the use of alcohol and drugs has had a substantial impact on marine safety. Coast Guard marine casualty records spanning the years 1981 to 1986 reveal 75 deaths, 52 injuries, and $6.5 million in property damages resulting from casualties attributable to the use of intoxicants. In addition, during the same period, the Coast Guard took suspension or revocation action against 89 seamen for alcohol-related offenses and 134 seamen for drug-related offenses.

It is acknowledged that the above data are sparse and are not conclusive. However, fatal accidents and suspension and revocation proceedings cannot be the only basis on which to judge whether or not there is a problem with substance abuse. There is no way to gauge how many minor or near accidents there have been due to intoxication.

The absence of widespread data may be due to several factors. First, the use of drugs and the abuse of alcohol is something that many people go to great lengths to conceal. Second, detection by employers is not easy. Many merchant mariners never see their employers, or see them only on an infrequent basis, and full-time surveillance by the Coast Guard and others is neither practical nor economically feasible. Third, even when there is supervision or surveillance of individuals, few people (including fellow crewmembers) are trained in how to detect drug or alcohol abuse. As one commenter to the Federal Aviation Administration's Advance Notice of Proposed Rulemaking entitled "Control of Drug and Alcohol Use for Personnel Engaged in Commercial and General Aviation Activities." (FAAD 86–20, 51 FR 44432, December 9, 1986), stated, "We have been surprised by the persons who have tested positive. Employees whose personal habits, appearances and lifestyles appear to be above reproach have tested positive for drugs and subsequently admitted their use." Finally, it is possible there are individuals who are "enablers," in that they may tolerate or cover for a person with a drug or alcohol problem, especially if the person might suffer the loss of a job and the associated adverse financial consequences.

The Coast Guard has previously addressed the issue of drug and alcohol abuse in an Advance Notice of Proposed Rulemaking concerning Certification of Seamen (CGD 84–088, 50 FR 4875 February 4, 1985), and in a Final Rule concerning Operating a Vessel While Intoxicated (CGD 84–099, 52 FR 47526, December 14, 1987). A review of the comments submitted on these rulemakings indicates that there is wide support for drug screening among marine companies, industry associations, and marine personnel. A recent Towing Safety Advisory Committee (TSAC) recommendation objected to employer involvement in testing and enforcement, but otherwise endorsed the need to eliminate drug users and those who operate a vessel while intoxicated from the merchant marine. While the Coast Guard does not dispute the professionalism of the vast majority of those in the marine industry and their commitment to a drug and alcohol abuse-free marine environment, reports from some shipping companies that screen their crews for drug usage indicate that a significant number of their employees were found to be users of drugs.

In light of these factors the Coast Guard is proposing regulations to require effective chemical testing programs for holders of licenses, certificates of registry, and merchant mariners documents and other maritime personnel in order to minimize the drug and alcohol problem in the merchant marine. The Coast Guard is very interested in receiving any additional data on the use of drugs in the maritime industry.

Readers will note that proposals by other modes in the Department of Transportation use the term "Sensitive Safety and Security Related Positions" when classifying personnel subject to testing programs. It is the position of the Coast Guard that all individuals engaged on board a vessel contribute to the function of the vessel or the accomplishment of its service. In addition to regularly assigned duties, each individual has responsibilities which relate to safety and to emergency situations. Non-performance of these duties could pose threats to the safety of the individual seaman, the vessel, other persons on board, and the marine environment. Therefore, the testing programs proposed in these rules do not differentiate between classes of personnel subject to testing. The proposal applies to all individuals engaged aboard any vessel on which licensed, certificated, or documented personnel are required; such individuals perform sensitive safety related duties.

Jurisdiction

Congress has long recognized the danger posed by drug and alcohol use among merchant marine personnel. This is evidenced by certain statutes contained in Title 46, United States Code (U.S.C.), regarding alcohol and drug use by merchant mariners, particularly those who hold licenses, certificates of registry, or merchant mariners documents.

46 U.S.C. 2302 provides for penalties for all marine personnel who operate a vessel in a negligent manner or while intoxicated. The Coast Guard considers "negligent manner" as including the operation of a vessel while under the influence of drugs or alcohol. The standard to be applied in determining intoxication for personnel operating commercial vessels was set out in the

Final Rule concerning Operating a Vessel While Intoxicated (CGD 84-099, 52 FR 47526, December 14, 1987). This Final Rule set both a behavioral standard and a blood alcohol concentration (BAC) standard of 0.04 percent.

For those who hold licenses, certificates of registry, or merchant mariners documents, the laws contain additional provisions regarding drug and alcohol use. 46 U.S.C. Chapter 77, "Suspension and Revocation," contains strict provisions concerning drug and alcohol use. The Secretary, under 46 U.S.C. 7703, can suspend or revoke a license, certificate, or document if an individual has committed an act of misconduct or negligence, or demonstrated incompetence. It is well settled that incompetence, misconduct, and negligence, include acts involving alcohol and drug use. Under 46 U.S.C. 7704, whenever drug use is proved at a suspension and revocation hearing, revocation is mandatory unless cure is shown.

For drug abuse, 46 U.S.C. 7704 states:

> (b) If it is shown at a hearing under this chapter that a holder of a license, certificate of registry, or document issued under this part, within 10 years before the beginning of the proceedings, has been convicted of violating a dangerous drug law of the United States or of a State, the license, certificate, or document shall be revoked. (c) If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate, or document shall be revoked unless the holder is cured.

In addition, in Chapter 75, "General Procedures for Licensing, Certification, and Documentation," 46 U.S.C. 7503 dictates that:

> A license, certificate, or document authorized to be issued under this part may be denied to an individual who: (1) within 10 years before applying for the license, certificate, or document, has been convicted of violating a dangerous drug law of the United States or of a State; or (2) when applying, has ever been a user of, or addicted to, a dangerous drug unless the individual provides satisfactory proof that the individual is cured.

In both chapters, "dangerous drug" is defined as "narcotic drug, controlled substance, and marihuana (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802))."

It is clear that the statutes are intended to exclude drug users and violators of drug statutes from serving on U.S. merchant vessels, as well as preventing the operation of vessels by intoxicated personnel. The Coast Guard currently enforces the statutes through the examination of the criminal conviction records of license and document applicants and holders, through the prosecution of those operating a vessel negligently or while intoxicated, and through administrative remedies such a civil penalty actions and suspension and revocation proceedings. However, these methods have not been particularly effective since, as a practical matter, an incident typically must occur before the Coast Guard obtains evidence on which to base remedial or punitive action. With advances in the reliability of methods utilized to detect drugs in urine, as well as the increased accessibility of test processing facilities and the relatively simple procedures involved in collecting samples for testing, the Coast Guard is offered the opportunity to propose requirements that will effectively identify drug abusers. The proposed requirements are similar in nature to those in place or proposed in the other regulated transportation industries, and are intended to ensure, to the extent feasible, uniformity within the transportation industries of the United States.

The Coast Guard's authority over commercial vessels is based primarily on the type of vessel. Some commercial vessels, such as fishing and towing vessels, are not required to be inspected and are subject to limited Coast Guard regulation. Although the vessel itself may be subject to limited regulation, some or all of the vessel's crew may, by statute or regulation, be required to hold a license, certificate, or document issued by the Coast Guard. To provide the greatest possible assurance that the commercial fleet has a safe, drug-free, work environment for all personnel, the Coast Guard is proposing that an individual may not be employed, including self employment, on a vessel in a postion for which a license, certificate of registry, or merchant mariners document is required, unless the entire crew is covered by the proposed rules. This means that the entire crew of a fishing vessel over 200 gross tons, an uninspected passenger vessel, and a towing vessel, would be covered.

Proposals

Goals of Testing

The overall goal of testing is to foster a drug and alcohol abuse free transportation environment which will continue to merit public confidence. A drug-free environment means that an individual covered by this proposal does not have dangerous drugs in his or her system at any time. If drugs are used, the individual could lose the right to work in his or her occupation. Thus, even "off-duty" use would be prohibited.

In the case of alcohol, present urine testing technology only permits a rough estimation of alcohol concentration levels in an individual's blood. For this reason, this proposal does not require urine testing for alcohol. The rule could be modified if there are advances in urine testing in the future.

This does not mean the Coast Guard condones abuse of alcohol. The Coast Guard has issued a Final Rule concerning Operating a Vessel While Intoxicated (CGD 84-099, 52 FR 47526, December 14, 1987) that prohibits an individual from consuming alcohol on-duty or performing duties while intoxicated. Off-duty use is limited and subject to the restrictions contained in the final rule. With reasonable cause, testing to determine blood alcohol levels can be directed.

In addition to determining whether drugs have been used, the chemical testing program outlined in this proposal will enable the Coast Guard to collect data as to the extent of substance abuse. This data will in turn enable the Coast Guard to plan future action, such as education and training to combat substance abuse.

This NPRM proposes specific requirements for testing procedures and rehabilitation programs. As noted below, the Coast Guard realizes that some of these requirements may be difficult to achieve as proposed. This may be especially true for small employers. The Coast Guard is interested in comments on ways in which its goals can be achieved through procedures or programs without the need for detailed regulatory requirements. For example, should Coast Guard permit programs developed by consortiums of marine employers that conform with the basic requirements of the following proposed specific program? As noted later in this preamble, the Coast Guard is also interested in obtaining comments on the feasibility and effectiveness of having Coast Guard approve company-specific programs that conform with the basic requirements of the proposed program. If this approach is adopted, an industry-wide program, developed by employers may be a viable and expedient mechanism to implement drug abatement programs. In addition, this type of approval may provide more flexibility to the industry. If so, the Coast Guard requests detailed comments on how such an approval program would be implemented. The Coast Guard believes that any divergence from the proposed specific program would have to comply with its goals.

Chemical Testing Procedures

On April 11, 1988, the Department of Health and Human Services (HHS) published final guidelines for drug testing procedures and standards for certifying drug testing laboratories (53 FR 11970; April 11, 1988). The guidelines apply to drug testing programs conducted by Federal agencies themselves. This NPRM would direct regulated parties to conduct their drug-testing programs according to these guidelines as well.

The HHS guidelines include solutions to concerns such as the integrity of the sample collection process, maintaining a proper chain of custody, and ensuring that laboratories that do drug testing are qualified to do so.

The HHS guidelines establish what illegal drugs must be tested for (marijuana and cocaine), as well as additional drugs which may be tested (e.g., amphetamines, PCP, and opiates). In addition, the guidelines specify the levels of drug metabolites in a sample that would result in a positive test being reported. The Coast Guard invites comments as to which additional drugs, if any, should be included. Commenters should also provide cost and benefit data regarding any additional drug groups.

The guidelines specify the types of tests that would be required for initial screening tests (an immunoassay test) and confirmatory tests (a gas chromatography/mass spectrometry test). The guidelines also specify collection procedures. These include the use of toilet bluing agents, temperature monitoring, and other steps to ensure the integrity of the sample without requiring observation of the individual while he or she is providing the sample. The sample collection procedures also include filling out a chain-of-custody form to accompany the sample as it goes to the laboratory.

The guidelines for a laboratory processing of samples cover both technical and procedural steps designed to ensure that a proper chain of custody is maintained and that the test is conducted accurately. Intralaboratory chain-of-custody forms would be used; only authorized personnel would have access to the sample. Records concerning the calibration of testing instruments would be maintained. Laboratories would report test results to the employer in a timely manner, and statistics on the tests would be retained by the laboratory for 2 years.

In addition to setting forth qualifications for key laboratory personnel and quality control procedures for the laboratories, the guidelines include standards and procedures through which HHS certifies laboratories. Regulated parties would be required to use only those laboratories which HHS has certified pursuant to these standards.

The guidelines also mandate the use of Medical Review Officer (MRO) to review test results. The MRO is specifically intended to ensure that drug tests were properly administered and that the test results were accurate.

While the use of any controlled drugs, unless medically prescribed, is not condoned, the Coast Guard recognizes that due to equipment limitations and possible "passive" exposure to drugs, any test results indicating drug or metabolite levels below the cut-offs may not be accurate reflections of whether an individual has used drugs. Therefore, drug or metabolite levels below these cut-offs will be considered a negative test result and will not disqualify a person from service in the merchant marine.

Prescription drug use, used as medically prescribed, would not generally be considered a reason for corrective action; however, partial or total impairment due even to prescribed drug use is nonetheless a threat to safety, and, as is current practice, the Coast Guard may deny or suspend licenses, certificates of registry, and merchant mariners documents for this reason in appropriate circumstances.

Implied Consent

The proposed regulations state that any individual accepting employment on board any vessel on which any individual is required to be licensed, certificated, or documented would be deemed to have consented to submit to chemical testing. This implied consent provision is consistent with the Federal Railroad Administration regulations dealing with substance abuse.

Note.—See 49 CFR Part 219.

The existence of an implied consent provision would facilitate the acquisition of breath, blood, or urine samples in a timely and efficient manner. An individual could still refuse testing since the regulations do not authorize physical coercion; however, refusal would be considered a violation of regulation and could subject an individual to proceedings which may result in suspension or revocation of a license, certificate, or document under 46 U.S.C. 7003 and Part 5 of Title 46, Code of Federal Regulations, or termination or refusal of employment in the case of an individual who does not possess a license, certificate, or merchant mariners document.

Periodic Testing

The Coast Guard proposes to require urinalysis in connection with required physical examinations which are incident to various license or merchant mariners document transactions. Only those individuals required to receive a physical examination for a license or document transaction, or those required to receive periodic physical examinations, would be required to undergo a periodic urinalysis for drugs. The testing would be part of that physical examination. The results of the physical examination and urinalysis would have to be presented at the Regional Examination Center (REC) and an application would not be considered complete until the chemical test results required by these regulations have been submitted. All test results would be kept by the REC and become part of the individual's file.

Some individuals are required to receive periodic physical examinations, normally on an annual basis. When they renew their license, they would have to present documentation of each urinalysis taken with a physical examination since their last license transaction. This would ensure that the individual received all required drug tests.

An individual who has been subject to a random sampling program, and who has been tested under that program would not be subject to the requirement for periodic testing if the applicant provides satisfactory evidence certifying that he or she has been continuously subject to a random sampling program for not less than six months, has not tested positive for dangerous drugs, has not refused to participate in required chemical tests, and has been tested within the past six months. However, even if the above conditions are met, the periodic testing requirement would continue to be applicable to those individuals whose chemical test is part of a physical examination for issuance of an original license or merchant mariners document.

Because the date of periodic testing is known to the employee, an individual who uses drugs could stop taking them prior to the test in order to avoid detection. However, not all individuals would have sufficient control over their drug use to do so. Periodic testing would have the advantage of being less costly, since it would be performed during an already required exam. Because of the scheduled nature of periodic testing, comment is requested concerning its effectiveness. Should this type of testing be a part of all future drug programs, or should it be phased out after several years when the other forms of testing are established and working smoothly? Periodic testing would appear more likely to detect dependent drug users as opposed to casual users. After an initial round of periodic tests, most of the dependent users should be detected and, therefore, the benefits of additional periodic testing may decrease. The Coast Guard, therefore, is also considering only requiring periodic testing once for each licensed individual. This alternative would significantly cut down on the costs of testing, and in light of other testing measures such as pre-employment and random testing, commenters should address the costs and benefits associated with this alternative.

Preemployment Testing Programs

The Coast Guard is proposing that preemployment testing be required of all applicants for employment aboard any vessel on which licensed, certificated, or documented personnel are required. The purpose of testing applicants is twofold: One, it would convey a clear message that the employer is serious about establishing and maintaining a drug-free environment; and two, it would help identify those who are either addicted to or so dependent upon drugs that they cannot abstain from drug use. Applicants would be informed that tests will be conducted to determine the presence of drugs. The concept of preemployment testing is flawed to some extent because individuals can avoid detection by abstinence. However, data on preemployment testing in the airline industry reveals some positive test results ranging from 4.2 percent to 20 percent among selected carriers. As such, preemployment testing does provide a valuable service in the selection of employees.

It is intended that the preemployment testing program be employer sponsored, however, the Coast Guard will consider other arrangements that would produce equivalent coverage. The Coast Guard recognizes that, in many instances, employment on commercial vessels is of relatively short duration, such as a single voyage, and that unduly repetitive testing of an individual could result. For pilots, their term of employment on a particular vessel, or for a particular employer, is frequently measured in hours. The Coast Guard specifically invites suggestions by unions, associations, or other organizations for alternative testing programs that would provide adequate assurance to employers that a prospective employee is not a substance abuser.

The Coast Guard also recognizes that employment of crewmembers frequently takes place on short notice and test results may not be available prior to signing on a new crewmember at the time of vessel sailing. While this could result in some instances where a crewmember could not be readily replaced at the time the results were made available to the employer, the Coast Guard anticipates that the number of such occurrences would not be significant since many experienced mariners will already be subject to random sampling programs from previous employers. However, the Coast Guard may revise the regulations to ensure that preemployment test results are made available before a vessel sails, or make provision for the acceptance of test results from previous periodic or random tests in lieu of the preemployment test. Comments on how to address this issue are specifically invited.

Random Sampling Programs

In addition to the testing programs outlined above, the Coast Guard is proposing the implementation of employer-sponsored random drug sampling programs. The proposed rules delineate the basic requirements for a random sampling program.

Random drug sampling applies the principle of random selection in that individuals are subject to drug testing at any given time. Periodic and preemployment screening on their own may not be sufficient deterrents since they permit individuals to schedule periods of abstinence from drug use. It is believed that random sampling programs are the most effective method currently available to limit potential drug use since they prevent a drug user from preparing for the screening in advance. There are data suggesting that random drug screening can reduce drug use. In the Defense Department's 1985 Worldwide Survey of Drug and Alcohol Abuse, overall drug use was registered to have dropped from 27 percent in 1980, to 19.0 percent in 1982, and then to only 8.9 percent in 1985. This drop in drug use corresponds to the implementation of servicewide random sampling programs. The Coast Guard's own experience with random sampling of its uniformed personnel has resulted in detected drug use falling 75 percent in the five years since the program was implemented. The success of the military's program, as well as those in industry, leads the Coast Guard to believe that random sampling would significantly limit the use of drugs in the marine industry.

It is envisioned that random sampling programs would be mandatory for all employers owning or operating vessels on which crewmembers are required to hold licenses, certificates of registry, or merchant mariners documents. Testing would be required for all personnel on inspected vessels and uninspected vessels on which any one or more personnel are required to be licensed, registered, or certificated. The Coast Guard's regulatory authority over these types of vessels and personnel is generally contained in 46 U.S.C. 2103, 3306, 7101, 7301, and 7701.

Besides employer-sponsored programs, there are alternative approaches that could be used to implement random programs, including Coast Guard or State administered programs. However, both of these alternatives were considered and rejected due to perceived problems with effectiveness, authority, cost, and applicability on both the federal and state level. The Coast Guard believes that employer-sponsored programs are the most effective because employers maintain routine contact with their personnel and have a vested interest in ensuring that their vessels and equipment are used properly.

Random selection means that every member of a given population has an equal chance of selection on a scientifically valid basis. Random selection would be accomplished through the use of a random-number table or computer based, random-number generator. Both methods select individuals by matching random numbers against employees' indentification numbers, e.g., social security number of employee, payroll account number, etc.

The Coast Guard desires that the standards utilized for random sampling ensure randomness and selection of a sufficient number of employees to force drug users to modify their behavior. The Coast Guard requests comments on a range of possible annual testing rates up to 125 percent for random selection. This does not mean that the rate will be set at that percentage, but it serves as a cap upon which comment and data are requested. In particular, the Coast Guard invites comments on documented cases or examples of other random sampling programs, the testing rates that were used, and their success. How would different sampling rates affect the numbers of drug users who volunteer for rehabilitation under each of the rehabilitation options appearing elsewhere in this text? Is there any evidence to support alternative assumptions regarding the rates at which drug users would volunteer for rehabilitation? What is the lowest sampling rate for random testing that would be effective in determining drug abuse? Would a lower rate be more effective if the severity of the penalties increase? Would higher sampling rates result in sufficiently higher benefits to justify the costs? Do lower sampling rates necessarily result in lower benefits? Is it reasonable to assume that benefits are directly proportional to the sampling rate? Would the higher sampling add sufficient deterrence to reduce the costs of and need for rehabilitation? The Coast Guard intends to select an appropriate rate based on effectiveness, deterrence, costs, and benefits. Commenters need to identify what that rate should be and provide the basis for their views.

Random drug testing requires a specific implementation plan to deter drug use. For instance, a 125 percent plan would mean that a population of 1,000 would be targeted to provide 1,250 annual samples. Using a true random selection basis, employees selected for each weekly/monthly increment would be returned to the pool of eligibles and subject to reselection. The possibility of reselection ensures continuous deterrence in that an individual selected early in the testing cycle would still be subject to testing throughout the remainder of the year. One feature of this plan (which could be considered a drawback) is that some employees might not be selected at all during the first year and others could be selected more than once.

The Coast Guard is considering whether the drug programs should provide for adjustment of the minimum sampling rate based upon the success of the program. Although a numerical target is needed as a benchmark for discussion, in actual practice there may come a point of sharply diminishing returns from any set level as the mix of countermeasures detects most chronic substance abuse and deters casual use. The testing program could be designed so that it could be phased up or down as appropriate and in response to the pattern of results obtained through the program. In combination with post-accident testing experiences, the results of random testing would provide the most useful gauge of the need. The Coast Guard is considering whether there are circumstances under which the program should allow for the level of effort to be increased or scaled back based on a method of evaluation stated in the rule or, if an approval process is used, based on individual applications, and specially requests comments on this issue. The Coast Guard also solicits comments on whether companies that develop exemplary records should be relieved at some future time from some or all of the requirements of this proposal. As with other issued rules, the Coast Guard reserves the right to make appropriate adjustments in the rule in response to public comments. Are there any other ways to reduce costs or improve the effectiveness of the proposed rule? For example, are there any ways to grant employers flexibility without compromising the objectives of the rule? What would be the likely cost savings, if any, in a more flexible approach. The Coast Guard also requests comments as to whether the rule should contain a provision allowing a company with a high level of safety with regard to drug use, demonstrated over a designated time period, more latitude in determining the application of its anti-drug program.

The Coast Guard is concerned that the standards developed for random sampling protect an employee from harassment or discrimination. Thus, the Coast Guard is proposing to require employers to adopt a method of selection which ensures randomness (e.g., random number table), and to conduct this portion of its drug testing program at unannounced intervals.

In view of the above, the following questions regarding the standards for random sampling are posed:

1. Should the Coast Guard specify the method to be used by employers to select employees for testing?

2. Should the rule permit employers, especially the small ones, to use a third party to set up and maintain their drug testing program? They could choose to comply with the rule through the use of several options, including: (a) Form consortiums made up of small employers that would develop a centrally administered random testing program; (b) Form consortiums, and hire a contractor to develop and implement a random testing program; (c) Contract separately with an outside company that would set-up and provide these services; (d) Have existing industry-related groups (e.g. trade associations) set-up drug program in which small entities could participate; (e) Arrange to be included as a part of a larger company's drug testing program. who would be responsible for their implementation? Oversee their operation?

3. Another issue in this area is the matter of "randomness" among shall or isolated populations. What, for example, is the meaing of a random test to an employee population consisting of only one employee, or a few employees? This problem is particularly acute if the owner or manager of the business is also the sole person, or one of only a few persons, subject to testing. Similarly, although surprise is an essential feature of a true random sampling program, how can this be achieved when the employee is located in a remote location and must be transported some distance to provide a sample? This could result in the loss of the element of surprise in many cases.

A fundamental issue with a requirement for employer-sponsored random sampling programs is how to implement programs that are effective yet take into consideration the differences in the industry operations. Such problems as high turnover of personnel, vessels operated by only one licensed person, companies with small staffs, and differences in vessel operations and service all combine to make uniform implementation of random programs an extremely difficult proposition. To deal with these problems, the proposal also allows for the random sampling programs to be conducted by an association, union, or other organization with which individuals serving in the marine industry are associated. The Coast Guard encourages small operators to organize for this purpose.

One of the more difficult problems associated with random programs is the implementation of testing for individuals who own and operate their own vessels. These individuals are both employer and employee, and occasionally operate with a small staff to assist them. The same problem exists for pilots, who in most cases operate independently from any "steady" employer and instead work on a contract to contract basis. We recognize that a requirement for random sampling by and for these individuals would be extremely difficult to implement, and the Coast Guard welcomes any comments on how best to include them in the drug testing.

The requirement for random sampling may not only present practical problems, but may also have a disproportionate impact upon the owner or operator of a small vessel. The proposed rule is applicable to all inspected vessels and those uninspected vessels which must be operated by persons holding licenses, certificates or registry, or merchant mariners documents, regardless of the size of a company or number of individuals in a vessel's crew. For small vessels having only two or three affected crew members, the cost of actually conducting the chemical test and verifying the test results should be in the range of $100 to $300 per year, assuming a random test rate of 125%, the use of a Medical Review Officer (MRO) under the HHS Guidelines, and that outside resources are readily available for an employee assistance program. Of more concern is the administrative burden on the owners and operators in establishing and conducting a random test program and arranging for MRO services, employee assistance counseling, and rehabilitation. Because the Coast Guard is concerned with the adverse effect this rule may have upon small entities, comments concerning this issue are requested. Specific comments are requested on whether cut-offs could be used to limit the applicability of the rule, i.e. size of vessel's crew, total number of company seagoing personnel, the gross revenue of the company, etc. It should be kept in mind that many of the unlicensed and undocumented personnel on these vessels later advance to hold a license or merchant mariners document and serve on larger vessels.

While the Coast Guard is currently considering only applying random sampling programs to vessel personnel, there are numerous categories of personnel in other marine related positions who, if intoxicated, can jeopardize the safety of vessel operations. Shipboard personnel today are only a small percentage of the personnel necessary for vessel operation. Shoreside personnel perform many functions that are essential to vessel operations, such as handling lines, loading or unloading cargo, operating ship or shoreside cargo gear and cranes, or transferring fuel. The potential for these shoreside personnel causing a dramatic marine accident is often just as great, and in some cases greater, than for those who actually serve on board the vessels. For this reason, the Coast Guard requests any comments on including shore-based personnel in an employer sponsored program.

The Coast Guard envisions that for any covered individuals who test positive for drug use, remedial action could be taken. If illicit drug use is determined, the individual would be ineligible for seagoing employment in the merchant marine until (1) he or she had been rehabilitated, if the individual did not hold a license, certificate of registry, or merchant mariners document, or (2) he or she was reissued a license, certificate of registry, or merchant mariners document, if the individual originally held one. Reissuance of the license, certificate, or document would be contingent on successful completion of rehabilitation. Commenters should address whether the types of procedures afforded an employee should vary depending upon the consequences of a positive test, and whether the burden of proof on time validity of test result should be borne by the employer or the employee. The issues of employer rights to terminate or retain an individual and whether employers must reemploy individuals after rehabilitation are discussed below.

It should be noted that it is not envisioned that the Coast Guard will actually review and approve random sampling programs. It is estimated that over 19,000 vessels would be covered by these rules, and most are owned or operated by companies which have only one or two vessels. The size and diversity of this population would create an enormous administrative burden both on the Coast Guard and the marine employers. By permitting program self-certification, this administrative burden would be avoided while permitting program sponsors to more easily implement programs which meet their operational needs. However, in cases where questions arise as to whether a program is meeting the standards proposed in this rule, the Coast Guard will review the program to ensure compliance with the standards. The employer is responsible for carrying out the anti-drug programs, including compliance with the applicable HHS Guidelines. Failure of the employer to do so, like any failure of a regulated party to comply with Coast Guard regulations, makes the employer subject to enforcement action, including civil penalties. This should ensure that employers do not circumvent the rules.

The Coast Guard does not envision that any Government funds will be expended for random sampling, except those costs associated with suspension and revocation proceedings for those holders of licenses, certificates of registry and merchant mariners documents who test positive for drug use. This does not include costs associated with data collection discussed below. Other than these, all costs would be borne by the industry, either the employer, the mariner, or any association or union that represents them. These groups could cut costs by joining together to negotiate volume or large scale testing contracts, since volume orders with laboratories will allow the price per sample to drop significantly. The Coast Guard is considering defining what it considers an "employer" sponsored program to include those innovative cost sharing schemes that may arise and which are legitimate. However, for an alternative scheme to be acceptable it should not represent a decrease in coverage or effectiveness.

Reasonable Cause Testing

In the Final Rule concerning Operating a Vessel While Intoxicated (CGD 84–099, 52 FR 47526, December 14, 1987), the Coast Guard included a section, 33 CFR 95.035, concerning reasonable cause for testing to determine whether an individual is intoxicated. These proposals would go a step further by requiring testing based on a reasonable and articulable belief that an employee is using drugs, but is not necessarily intoxicated. Even if no mistakes are made at work, the employee may demonstrate a change in character or behavior that is symptomatic of drug use or alcohol abuse. Such changes are normally characterized by mood swings and changes in appearance, attitude, and speech.

Because of the subjectivity of the criteria and the possibility of employee harassment, at least two of the employee's supervisory personnel would have to concur in the decision to test an employee based on a reasonable suspicion of drug or alcohol use. At least one of these supervisors would have to be trained in detecting symptoms of drug use or alcohol abuse. Are there practical problems to this approach? Should the observers have to be supervisors? There will be situations where only one supervisor is available or the only persons in a position to observe an employee are not the employee's supervisors. What other criteria could be used that would protect a disfavored employee from potential harassment through testing? Should there be a limit to the number of times an employee can be subjected to reasonable cause testing, in order to prevent unwarranted harassment.

The Federal Railroad Administration has specified, in its existing chemical testing rule, the types of incidents that could justify requiring an employee to undergo testing. Should there be specified circumstances, such as particular rule violations, under which chemical testing would be automatic? If so, what kinds of rule violations would suggest a drug or alcohol problem and should trigger reasonable cause testing? Could a similar program work in the marine industry? One difficulty lies in identifying which of the many operating rules applicable to vessels are sufficiently related to the mental and physical condition of the person responsible for compliance to permit inference that the violation of the rule may be due to drug or alcohol use. Should all operating rules so identified be treated equally, with a violation of any rule establishing reasonable cause for testing, or should violation of only the more important or critical rules be treated in this manner? Would the impact of establishing a list of specific rule violations fall disproportionately on masters or persons directing the movement of the vessel and have little or no application to engineering personnel and others performing tasks that may be equally important to the safety of the vessel but not directly related to its navigation? The Coast Guard welcomes comments on whether this provision should be included in the final rule, how this provision might be implemented, and recommendations for specific operating rules which, when violated, would indicate reasonable cause.

We propose to authorize employers to test for any Schedule I or Schedule II drug, if there is reasonable cause to believe that a particular drug was used, even though any Schedule I and Schedule II substances would not be tested for in pre-employment, periodic, and random testing.

Commenters also should present any data on the effectiveness of existing programs which use reasonable cause- or suspicion-type testing. At least one program that we are aware of provides for rehabilitation similar to that proposed under option 3, but which was worked out by labor and management. Sanctions, in terms of salary loss, are potentially quite severe for persons discovered to have drugs in their systems as a result of a test. Commenters should address the benefits, costs and deterrence value of such a program.

Post-Accident Testing

A number of toxicological sampling and chemical testing methods are available today for accurately assessing post-accident drug and alcohol levels in the human body:

Breath alcohol testing is a well accepted and instantaneous means of indirectly determining the blood alcohol concentration (BAC) level in a person's system at the time of the sampling if the test is properly administered through the use of a correctly calibrated evidential breath testing (EBT) device. Breath alcohol testing will not detect the presence of drugs in the person's system. BAC standards have been empirically related to functional impairment, and blood alcohol testing is widely accepted as proof of intoxication due to alcohol if conducted in a timely fashion following a serious incident. In this instance, what constitutes testing in a timely fashion is partially dependent on the sensitivity and operating capabilities of the specific EBT being used. Breath alcohol testing may be conducted by non-medical personnel. However, prior to being considered qualified, an EBT operator must undergo a formalized course of instruction covering such subjects as the effect of alcohol on the human body, scientific concepts related to breath alcohol testing, and proper use, calibration, and maintenance of the specific EBT being used. Data obtained through breath alcohol testing must be properly documented, but is not subject to chain of custody considerations.

Urine testing will detect the presence of alcohol and/or drugs in the urine at the time of the test. However, urine testing is of limited value in determining the recency of drug use because of the wide variances in the time periods over which drug metabolites dissipate, or remain detectable, in the urine (e.g., marijuana is detectable for several weeks or more after use, while cocaine remains for no more than 2–4 days). Collection of urine samples requires no specialized training and can be conducted by non-medical personnel. However, to ensure the validity of sampling and subsequent testing, procedural safeguards are required.

Blood testing provides the most accurate and comprehensive determination of the level of alcohol and drugs in the blood at the time of the test. Also, blood test results are well accepted as a means of specifically identifying impairment due to alcohol if sampling is conducted in a timely fashion following the incident. Impairment standards are not yet available for drugs, but are currently being studied by the National Institute of Drug Abuse, U.S. Department of Health and Human Services. Blood specimens must be taken at a medical facility or by qualified medical personnel, and must be obtained in a timely manner (within a maximum of 8–12 hours after an incident) because of the relatively rapid elimination of drugs and alcohol from the blood. Blood samples must be refrigerated and the chain of custody must be preserved.

In a direct effort to improve the quantity and quality of marine safety data and to implement provisions of the Coast Guard Authorization Act of 1984 (Pub. L. 98–557), the Final Rule concerning Operating a Vessel While Intoxicated (52 FR 47526, December 14, 1987), imposed a requirement for the owner, charterer, managing operator, agent, master, or person in charge (hereinafter designated as the "marine employer") to determine whether there was any evidence of alcohol or drug use by individuals directly involved in a marine casualty. The rule provides two methods by which the above determination may be made: by personal observation of an individual's demeanor, appearance, etc.; or through optional chemical testing methods including breath analysis, or urine and blood sample testing.

The Coast Guard believes that many marine employers will opt to make a post-casualty intoxication determination through personal observation methods rather than through chemical testing. This belief is based on two reasons. First, some employers will consider the expenses associated with purchasing sampling or testing equipment, training personnel, and arranging chemical analysis of samples, to be too great. Second, since marine casualty reports may be referenced in potential civil litigation proceedings related to the casualty, some marine employers may be reluctant to obtain definitive evidence of the role of alcohol or drugs in the casualty.

While personal observation is a valid qualitative method for determining intoxication, obtaining blood, urine, and breath samples and chemically testing such samples is absolutely necessary to accurately determine blood alcohol concentration (BAC) levels and to detect the presence of specific drugs in the body. Therefore, while the Coast Guard believes that the existing rules will improve marine casualty data to a degree, requiring chemical testing is considered essential for better defining the extent of alcohol and drug involvement as primary or contributing causes of such incidents and for providing more reliable information upon which to base enforcement actions and is proposing mandatory post-accident testing. However, vessel personnel may not be physically compelled to provide samples under this proposal.

Requiring blood, urine, or breath sampling and chemical testing following the occurrence of *all* categories of reportable marine casualties would provide the most complete picture of the incidence of alcohol/drug-related accidents. However, to do so for all casualties would not be practical nor economically reasonable. The Coast Guard therefore is proposing to require sampling and testing following only those marine incidents which result in death, injury, or significant property or environmental damage. These would be called "serious marine incidents." A "serious marine incident" includes any marine casualty involving a commercial vessel which results in: One or more deaths; an injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and in the case of a person employed aboard a commercial vessel, which renders the crewmember unfit to perform routine or emergency vessel duties (**Note:** It is also proposed to revise the definition of reportable injury in the present 46 CFR 4.05 in order to conform with these new requirements.); damage to property in excess of $100,000; actual or constructive total loss of any vessel subject to inspection under 46 U.S.C. 3301; or actual or constructive total loss of any self-propelled vessel, not subject to inspection under 46 U.S.C. 3301, of 100 GT of more. The term "serious marine incident" also includes a discharge of oil of 10,000 gallons or more into the navigable waters of the United States, as defined in 33 U.S.C. 1321, whether or not resulting from a marine casualty; and a discharge of a reportable quantity of a hazardous substance into the navigable waters of the United States, or a release of a reportable quantity of a hazardous substance into the environment of the United States, whether or not resulting from a marine casualty.

The Coast Guard recognizes that the extent of injury or damages associated with a marine casualty, or the quantities involved in a pollution incident may be difficult to discern or estimate in the immediate aftermath of such an occurrence. Nevertheless, the marine employer would be required to make a timely, good-faith judgment as to whether or not an incident is, or is likely to become, a serious marine incident.

When reporting marine casualties to which the sampling and testing requirements are applicable, marine employers would be required to submit a Toxicological Sampling Report (Form CG–2692B) directly to the Coast Guard along with the Report of Marine Casualty or Accident (Form CG–2692). The Toxicological Sampling Report (Form CG–2692B) would be required to be submitted whether or not sampling or testing was conducted. (**Note:** Please refer to § 4.06–1 of the proposed regulations for details concerning Form CG–2692B.) A second copy of the completed form CG–2692B would also be required to be included with any blood and urine samples being shipped to the laboratory. A properly completed Form CG–2692B would constitute appropriate documentation of the chain of custody on the part of the marine employer from the time of sampling until shipment. The laboratory would then indicate receipt of the samples which will complete the chain of custody.

Following a serious marine incident that is not a reportable marine casualty, such as a pollution incident not resulting from a casualty, submission of a Report of Marine Casualty or Accident (Form CG–2692) would not be required. However, submission of a Toxicological Sampling Report (CG–2692B) would be required in these cases, in the manner specified above.

All marine employers would be required to arrange and pay for blood and urine sampling at an American medical facility or by qualified medical personnel as soon as possible after the occurrence of a serious marine incident, in all cases where it is feasible to obtain samples within 24 hours following the incident. Each employer would be required to have available an appropriate blood and urine sampling and shipping kit for use by medical personnel. Employers would also be required to ensure the chain of custody of samples and prompt shipment of samples to a laboratory for analysis. In some cases, chain of custody and shipment could be handled by the medical facility or medical personnel collecting the samples. These requirements would be applicable to foreign vessels which experience serious marine incidents in U.S. territorial waters. However, operators of such vessels would have the option to have American steamship agents arrange for blood and urine sampling of involved foreign seamen.

Because certain classes of vessels routinely operate beyond 24 hours from American medical facilities, it is recognized that in a substantial number of cases, the obtaining of blood and urine samples at American medical facilities or by medical personnel will not be feasible. For this reason, inspected vessels certificated for unrestricted ocean routes (i.e., tankers, freighters, MODUs, and most offshore supply vessels) and inspected vessels certificated for restricted overseas routes would additionally be required to be equipped with evidential breath testing devices (EBTs) and the means to provide secure storage of urine samples. When a serious marine incident occurs involving vessels of this type, and blood and urine samples of appropriate personnel cannot be obtained at American medical facilities within 24 hours, breath testing and collection of urine samples would be required to be performed on board as soon as possible after the serious marine incident. Marine employers would be required to train appropriate personnel in proper EBT equipment use, to provide for secure storage of urine samples aboard the vessel, to ensure the chain of custody, and to ensure prompt shipment of urine samples to the designated laboratory.

All marine employers would be required to have available blood and urine sampling and shipping kit(s) for use whether samples are collected aboard the vessel or ashore. Marine employers operating one or more vessels within a local geographic area could satisfy this requirement by maintaining a kit or kits at a central shoreside location. Standardized sampling and shipping kits would be made available for purchase through a designated laboratory, for an estimated cost of $25 per box.

Evidential breath testing devices (EBTs) would be required aboard inspected vessels certificated for unrestricted ocean routes (i.e., tankers, freighters, MODUs, and most offshore supply vessels) and aboard inspected vessels certificated for restricted overseas routes. They are to be selected from among those listed on the Conforming Products List of Evidential Breath Measurement Devices amended and published periodically by the National Highway Traffic Safety Administration (NHTSA), Department of Transportation. This listing would also be available through Coast Guard Marine Safety Offices and Marine Inspection Offices. Similarly, EBTs would be required to be calibrated by use of a unit listed on the NHTSA Conforming Products List of Calibrating Units for Breath Alcohol Testers. Calibration would be required to be performed with sufficient frequency to ensure the accuracy of the device, but not less frequently than provided for in the manufacturer's instructions. Calibration frequency varies from as often as before each breath test to once a year, depending on the sophistication of the device being used.

It should be noted that the proposed regulations specify that a BAC of less than .02 percent is considered to be a negative result. 33 CFR Part 95 presently defines intoxication as .04 BAC and above, however, the Coast Guard desires to know any EBT test results above .02 BAC to determine whether alcohol could have contributed in any way to an accident, as well as whether there was a violation of 33 CFR 95.045 with its rules limiting alcohol use. A BAC of .02 is the present limit for accurate EBT equipment readings, therefore, any BAC level .02 or above should be noted on Form CG–2692B.

even if the intoxication standard of .04 BAC was not violated.

In addition to the good-faith determination previously described concerning whether an incident fits the definition of a serious marine incident, the marine employer would be further required to determine whether obtaining blood and urine samples at a medical facility or by medical personnel within 24 hours is practicable. In this respect, the Coast Guard also recognizes that commercial marine operations are unique when compared to other transportation modes due to the frequent remoteness of vessels from land or medical facilities and personnel, and the inherent need for vessel crew members to provide the initial trained response for indefinite periods of time to a wide variety of emergency situations such as fire, explosion, grounding, flooding, oil or chemical spill, etc. until the arrival of and relief by shore-based or other assistance. Factors to be considered when determining whether samples can be reasonably or safely obtained include, but are not limited to, the vessel's capability to reach port within 24 hours; the feasibility of transporting personnel to a medical facility ashore or transporting medical personnel to the vessel; whether compliance will adversely affect the safety of life, property, or the environment; etc. Cases of serious marine incidents in which sampling is not conducted will be carefully scrutinized on a case by case basis to determine whether compliance could have been reasonably and safely achieved. When it is determined that samples could have been reasonably and safely obtained but were not, the Coast Guard would consider initiating appropriate enforcement action under 46 U.S.C. 6103 or 46 U.S.C. 7703.

A person who needs to be tested after a serious marine casualty is a "person directly involved in a marine casualty or serious marine incident." This is considered to be a person who supervises, performs assigned duties in connection with, or otherwise actively participates in, any commercial vessel operation or any activity occurring aboard a commercial vessel which is a substantial factor in the events leading to the marine casualty or serious marine incident. The term "person directly involved in a marine casualty or serious marine incident" also includes any individual serving aboard a commercial vessel who is fatally injured or who is injured to the degree specified in 46 CFR 4.03–2. The following guidelines are given for determining the persons typically directly involved in a serious marine incident:

(1) For a vessel casualty such as a collision or grounding: The master, person in charge of the vessel, pilot, deck or engineroom watchstanders, lookouts, and any other person who may have been performing duties related to the operation or navigation of the vessel, as appropriate, may be directly involved.

(2) For a vessel equipment casualty, such as failure of propulsion, steering equipment, or auxiliary machinery: The chief engineer, engineroom watchstanders, and any other person involved in causing the casualty, may be directly involved.

(3) For fires and explosions: The master, chief engineer, and any other person possibly involved in causing the casualty, may be directly involved.

(4) For injuries or deaths: The injured or deceased person(s), the person's supervisor, if the person was performing duties when the injury or death occurred, and any other person involved in the accident, may be directly involved.

(5) For oil or chemical pollution incidents not resulting from a marine casualty: The person supervising the oil or chemical transfer operation, any other individual participating in such an operation, and any person performing any duties or activities who may have caused or contributed to causing the pollution incident, may be directly involved.

The Coast Guard recognizes that situations will undoubtedly arise in which the master or person in charge of a vessel is one of the individuals directly involved in a serious marine incident and is subject to providing blood and urine samples, or breath testing, as appropriate. Such individuals would still be required to ensure that the necessary samples are obtained and tests performed, including their own. However, owners, managing operators, and charterers are equally responsible under 46 U.S.C. 6101 for arranging contingency plans for such eventualities. On a large vessel such as a tank or cargo vessel, for example, the chief mate, chief engineer, or other responsible, licensed personnel could and should be trained to assist the master in ensuring that samples are obtained, as well as to arrange and witness the master's participation when necessary. On a smaller vessel such as a towing vessel with a single licensed operator aboard, the owner could establish contingency plans which involve the assistance or supervision of shoreside personnel.

Similarly, a situation may arise in which the owner, managing operator, master, and person in charge of a vessel are the same person; for example, the owner/operator of an inspected or uninspected small passenger vessel. In that instance, the single owner/operator would also be required to arrange for sampling, including his or her own. If that individual is unwilling or unable to comply with the sampling requirements, due to possible intoxication, injury, or other reason, the Coast Guard may become actively involved in arranging for sampling, if notified of the incident. Limited numbers of Coast Guard personnel will be trained and equipped to respond in such situations.

As previously indicated, the Coast Guard would evaluate any situation in which samples could not be obtained to determine whether or not samples could have been reasonably or safely obtained. When it is determined that samples could have and should have been obtained, but were not, the Coast Guard would consider initiating appropriate enforcement action under 46 U.S.C. 6103 or 46 U.S.C. 7703.

At room temperature, blood samples will deteriorate within a matter of hours following extraction from the body. Blood samples would therefore be required to be kept in cool or refrigerated storage until shipment to a designated laboratory for analysis; to be shipped in a standardized shipping box which is lined with styrofoam and which includes a sealable ice can for cold preservation during shipment; and to be shipped via an overnight freight service to ensure arrival at the laboratory within 24 hours of shipment. These provisions are designed to maintain the integrity of each blood sample to the maximum degree that is reasonable, and to provide the most valid sample for analysis purposes.

At room temperature, drug metabolites and other substances in urine will also dissipate, though much more slowly than blood. For this reason, urine samples need not be refrigrated after collection if expeditious shipment to the laboratory is ensured; however, for practical purposes, urine samples obtained at an American medical facility could be shipped in the same cooled shipping kit along with blood samples. Urine samples obtained on board an inspected vessel to which on-board urine sampling requirements apply would not be required to be shipped to the laboratory by overnight freight service; however, they would be required to be shipped by the next most expeditious means available.

For analysis, marine employers must provide the samples to a laboratory which meets the HHS Guidelines. This may require increased costs to the marine employer in connection with overnight shipment of samples to the lab, however, this will provide a much higher level of consistency and confidence in analysis results, and would ensure timely, accurate reporting of analysis results to the Coast Guard.

Rehabilitation

The NPRM proposes four different options concerning the circumstances under which employees would or would not be given an opportunity to seek rehabilitation. Under the first option, an employee who comes forward voluntarily or tests positive for drugs for the first time would be eligible for rehabilitation rather than be discharged. Non-employees given a preemployment drug test need not be given an opportunity for rehabilitation. Once rehabilitated, the employee could be reinstated into his or her prior position. The second option would give rehabilitation rights to employees who come forward voluntarily or who are identified as drug users during periodic or random tests, but would not require that the same opportunity be afforded to drug users identified in reasonable cause or post-accident tests; those not afforded the right to rehabilitation could be discharged. In the third option, only volunteers could claim rehabilitation rights. Anyone testing positive for drugs could be fired immediately. In the fourth option, employers would not be required to offer an opportunity for rehabilitation. However, the employers could voluntarily offer a rehabilitation program. In all cases, employers would be free to offer more rehabilitation options than the minimum proposed. For example, an employer could voluntarily offer two chances for rehabilitation rather than one, however, drug use following rehabilitation would subject an individual's license, certificate of registry, or merchant mariners document to revocation proceedings. Employees who undergo rehabilitation, whether voluntary or mandatory, and want to retain or regain their position would have to meet the requirements of this rule to complete the program and receive a recommendation for reinstatement.

Each of these approaches has its own merits. For example, the broad rehabilitation program anticipated by the first alternative is likely to maximize the benefits to society by ensuring that more drug users will get the help they need. If users are simply fired, they will often lose access to, and perhaps incentive to use, rehabilitation services, and they will continue to be drug users. However, it could be argued that employees who are found to be drug users through reasonable cause tests are less deserving of an opportunity for rehabilitation, and the second alternative would therefore exclude them. The third alternative would be lower in direct costs, because rehabilitation would only be required for employees who seek it voluntarily, but for the same reason this alternative might produce less in societal benefits. To what extent would each of the three alternatives raise or lower costs and benefits? Is it reasonable to assume that more drug users would self-identify under option (3) than under either of the other two options? Are the costs of required rehabilitation programs warranted by the reduction in societal costs resulting from drug abuse? The Coast Guard specifically invites comment on which of these or other alternatives offers the greatest benefits at the lowest cost, while remaining consistent with the intent and purpose of 46 U.S.C. 7704.

The fourth option, under which rehabilitation would not be mandated, would be the lowest in costs. This alternative may provide the most flexibility to labor and management to determine the need for and the shape of any rehabilitation program and that it also could provide deterrence to drug use and thus may yield large benefits with low costs. Commenters should address whether this alternative would be effective for the maritime industry. How would this alternative affect the deterrence value of the Coast Guard proposal? What impact would it have on the costs and benefits? Would not requiring rehabilitation foster other approaches to combating drug usage?

Under the first three proposed options, rehabilitation would only be required to be made available to those individuals testing positive for the first time; a second positive, including a positive detected during the monitoring program, would subject the individual's license, certificate of registry, or merchant mariners document to revocation proceedings or termination of employment of an individual who does not possess a license, certificate, or merchant mariners document. In addition, refusal to surrender the license, certificate or registry, or merchant mariners document would initiate revocation proceedings.

Present Coast Guard regulations provide that an individual who voluntarily deposits his or her license, certificate of registry, or merchant mariners document and subsequently demonstrates a satisfactory rehabilitation or cure and complete non-association with dangerous drugs for a period of six months, can have the documents returned or reissued. A person whose license, certificate of registry, or merchant mariners document was revoked for use or possession of drugs is still subject to the three years waiting period in 46 CFR 5.901; however, the rules permit waiver of the three years upon completion of a rehabilitation program followed by a one year period of complete non-association with dangerous drugs.

The Coast Guard is considering applying similar voluntary deposit provisions to seamen who are detected as having used drugs as the result of an employer-sponsored program. Seamen who are eligible for and choose to undertake rehabilitation would be allowed to deposit their license, certificate of registry, or merchant mariners document with the Coast Guard. After completion of a drug rehabilitation program, the individual would have to enroll in a drug monitoring program, which would include unscheduled drug tests. At the end of this period, the individual would have to present to the Coast Guard evidence of successful completion of the drug rehabilitation and drug monitoring programs.

At the time of the adoption of a final rule in this proceeding, we intend to provide procedures for the conduct of such tests. We invite public comment on what the final rule should contain. For example, should there be a uniform testing period after rehabilitation, or should this be determined on a case-by-case basis? Who should make such a determination: The medical review officer, the EAP counselor, or both together? Should the employee be involved? How could employee involvement be accomplished? If we adopt a uniform post-rehabilitation period, how long should it be? Is six months reasonable? Would longer periods constitute an unacceptable burden on employees and on the employer? Others might argue that a long follow-up period, such as one year, is called for. Should the length of the follow-up period depend on the kind of drug that was detected? Should it depend on the severity of the individual's drug problem, as indicated by the kind of treatment that was found to be necessary? For example, should someone undergoing inpatient rehabilitation be subject to post rehabilitation testing for a longer time than someone who needs only abatement counseling?

During the post-rehabilitation period, should we prescribe the minimum and/or maximum number of tests to be administered? We would want to ensure that any necessary tests would be given frequently enough to ensure that the employee is free of drugs. At the same time, however, we do not want drug testing to become an instrument of harassment of the employee or an undue burden on the employer. Here again is the issue of whether the number of tests given should vary with the kind of drug used and the severity of the employee's problem.

One alternative, on which we also invite comments, is a specified post-rehabilitation testing period that would apply only if the employee, the EAP counselor, and perhaps the employer failed to agree on an individualized program. Such a fall-back system could provide, for example, for up to four additional tests over the 12 months following rehabilitation.

Ideally, the seaman would be retained in an employee status, which could include leave without pay while undergoing in-patient or other intensive rehabilitation program, and employment as other than a crewmember while undergoing an out-patient monitoring program. For holders of a license, certificate, or document, upon return of the individual's license, certificate of registry, or merchant mariners document; or for those not holders of a license, certificate, or document, upon successful completion of a rehabilitation program; the individual would be entitled to resume the seagoing position he or she previoulsy held or an equivalent position.

The Coast Guard seeks comment on practical problems that may arise incident to rehabilitation efforts. For example, vessels subject to the inspection and manning requirements of Subtitle II, Title 46 U.S.C., have prescribed minimum manning levels that necessitate the immediate hiring of personnel to replace the seaman undergoing rehabilitation. Even large vessels have few, if any, positions that do not require a license, certificate of registry, or merchant mariners document, and many vessel operators do not have suitable alternate employment available ashore. These problems are intensified for small vessels with limited crew and shoreside employees.

In considering the feasibility of implementing a comprehensive program for assisting and rehabilitating employees, the following questions are applicable:

(1) What is the minimum employment relationship that an owner or operator should be required to maintain while an employee is undergoing rehabilitation and monitoring?

(2) Should an employer be required to pay for rehabilitation and the drug monitoring program? (The NPRM does not propose such a requirement.)

(3) What is the appropriate duration of a monitoring program and the number of random chemical tests that should be conducted during the program?

(4) What should be considered a bona fide rehabilitation and monitoring program?

(5) What are the appropriate roles for the owner or operator and the Coast Guard in overseeing the monitoring program?

(6) Are the costs of required rehabilitation programs warranted by the reduction in the societal costs resulting from drug abuse?

The Coast Guard believes there may be some employees whose normal period of employment is too short to make it practical to require rehabilitation and reemployment. For example, even if a short term hire tested positive for drugs, the end of the scheduled employment term might come before completion of the rehabilitation program. Therefore, the Coast Guard does not propose to require employers to offer an opportunity for rehabilitation to temporary employees who are hired for a short period. That is, if such employees test positive, they could be dismissed immediately.

The Coast Guard is considering defining a temporary employee as one hired for a period of 90 days or less. However, there may be a considerable number of vessels that typically hire seasonal employees for periods slightly in excess of 90 days. For example, some small passenger carrying vessels hire additional personnel for the annual summer tourist season that lasts from Memorial Day to Labor Day. Should the temporary employment period be 120 days or some other period? Should the definition of temporary employment provide for different categories, by type of vessel or employee, and, if so, what categories are appropriate? Would it be feasible to define the temporary employment period as not more than 90 days, but provide for individual waivers or extensions?

We recognize that some employees hired on a "temporary" basis are actually regularly reemployed. Some of these employees are recurring seasonal employees, others are continually reemployed at the end of a specified term. These persons are regular members of the industry, and thus should not be excluded from the opportunity for rehabilitation and reemployment. Comment is requested on how to include these individuals under the rehabilitation and reemployment program.

The Coast Guard specifically requests comments on the (1) the merits of excluding temporary employees from the opportunity for rehabilitation, and (2) the definition of temporary employee.

The Coast Guard is also considering not requiring employers to provide an opportunity for rehabilitation and rehire under two other situations: employees on strike and employees scheduled for layoff. The Coast Guard specifically requests comments on the merits of excluding striking employees or employees scheduled for layoff, and asks commenters to define "scheduled for layoff."

Another problem concerns new employees. Should a seaman be offered the opportunity of rehabilitation and reemployment even though he or she may have joined a company only recently and might still be on some sort of probation? Should eligibility for rehabilitation and reemployment be based on length of service, hiring status, or some other criteria?

Employee Assistance Programs

One method of preventing, as well as encouraging the voluntary cessation of, drug and alcohol use is the establishment of an Employee Assistance Program (EAP). An EAP, in addition to including any of the rehabilitation options described above, includes education and training components.

An EPA program is multi-faceted and supportive in that it offers education and training as a means of combating and preventing drug or alcohol abuse. It must be recognized that an EPA itself will not seriously deter drug or alcohol abuse unless accompanied by the threat of discovery by drug testing. The Coast Guard had a Drug Exemption Program that was intended to encourage Coast Guard military personnel to seek rehabilitation by voluntary disclosure of past illegal drug use. A Commanding Officer's grant of a one-time exemption, following disclosure, precluded disciplinary action and administrative action other than an honorable discharge. Rehabilitation for members who were retained included counseling, education, and inpatient treatment at U.S. Navy facilities for members diagnosed as drug-dependent. Users detected without voluntary disclosure were subject to disciplinary or other adverse administrative action. The

Coast Guard's experience between 1980 to 1982 disclosed that the Drug Exemption Program failed to convince members using illegal drugs to seek help and cease their misconduct. Very few drug-dependent members were identified or treated and the incidence of drug use did not appear to decline as a result of the program.

Based on the above results, the Coast Guard cancelled the exemption program and initiated a random drug testing program which witnessed a decrease in the number of routine confirmatory urinalysis tests from 103 per 1,000 in 1983 to 29 per 1,000 in 1986. Thus, it is felt that the threat of detection through random sampling is a necessary part of an effective drug program. It should motivate individuals to stop using drugs and may encourage them to seek help through EAPs voluntarily.

The type of EAP services provided should consist of the following:

(1) Educational materials regarding drug and alcohol abuse and the consequences of such use from an employment, safety, and personal health/welfare perspective.

(2) Annual and other recurring training in the form of classes, forums, speakers, etc. for supervisory personnel.

(3) If adopted, rehabilitation, to consist of referral and other services as well as procedures for returning a rehabilitated employee to work, and monitoring their continued drug-free status.

The establishment of an EAP would not require payment of compensation for absence from work to obtain counseling and treatment. Compensation remains a matter between employee and employer.

Who should be afforded EAP services and under what circumstances? What is the estimated level of voluntary enrollment in EAP services at sampling rates of 125 percent and at 12.5 percent under each rehabilitation option? What are the estimated costs of individual EAP rehabilitation services under each rehabilitation option? Should training be mandatory for employees only in the first year and required annually only for supervisors? Should the Coast Guard specify a minimum training period?

It is recognized that not all employers will have the fiscal resources to implement a "company" EAP; however, the employer has a responsibility to both employees and the public to provide for a drug and alcohol abuse free environment to the maximum extent practical. As such, employers could provide or make EAP type services available through one of the following means: (1) A company operated EAP; (2) contractor/consortium arrangement; (3) arrangements with local community service organizations; or (4) other alternatives justified as being workable and providing an equivalent level of services. Comment is requested on the other possible alternatives.

Oversight of the Chemical Testing Program

Procedures for testing and analysis of tests, as well as the accreditation of laboratories, must follow the HHS Guidelines under this proposal. However, because of the nature of the marine transportation industry, there is always the possibility that testing will be required of employees in remote locations. It is expected that every employer will attempt to ensure that all the requirements of the testing program are met. However, it is realized that in some cases an employer will not be able to supervise testing or even ensure testing is performed; therefore, the Coast Guard intends to establish guidelines on acceptable deviations from the testing requirements and procedures. These guidelines would not exempt employers from the testing requirements, but would outline the instances in which testing deviations may be acceptable to the Coast Guard. Employers would be required to make good faith efforts to ensure that testing is conducted in the most expedient but proper method available; non-compliance may result in administrative penalties.

Employer Flexibility

The Coast Guard recognizes that drug use is a complex problem that requires dynamic responsive solutions. The Coast Guard believes that its proposed program meets the agency's statutory mandate to promote safety and that it responds to the public's need for a safe and drug free marine environment. The Coast Guard is also interested in comments on whether there are ways to increase flexibility in the program or reduce costs without decreasing safety. For example, should the Coast Guard allow covered employers the option of submitting to the Coast Guard a company-specific anti-drug program that conforms with the basic requirements of the Coast Guard proposed rule?

The Coast Guard recognizes the costs and burdens associated with drug abatement in general, and wants to ensure that marine anti-drug programs are as cost-effective as practicable. Would providing for company-specific programs encourage the development of innovative solutions that may be less costly and more effective? How? Could similar innovations be developed under the proposal set forth in this notice? How can the Coast Guard ensure that its final rule promote the development of efficient and effective solutions?

The proposed Coast Guard program includes a required random sampling rate that could range as high as 125 percent of the tested population. This level has proven to be effective in reducing drug use among Coast Guard personnel, but we have asked for comments on how low a testing percentage could be adopted without undermining the deterrent effect of the testing program. Whatever sampling rate is chosen as the industry-wide norm, would it be possible for a company-specific program to be designed in a way that would allow employers who can justify a need to test at a lower or higher sampling rate to test at this rate. How could this be accomplished?

The Coast Guard also requests comments on whether employers could also limit the size of the population subject to a full range of testing strategies to those sub-groups of employers where an initial round of testing has revealed a more serious drug-use program. In such a case, the employers may be able to rely on a less costly set of requirements to ensure that employees in sub-groups with less serious or more easily determined problems, remain risk-free. In addition, are there ways employers may avail themselves of less costly and less instrusive technologies as such advances are made while ensuring an appropriate-level of safety? Are there other types of flexibility that the Coast Guard should consider? Commenters are requested to submit any empirical data that support their views.

Could the current proposal provide similar flexibility by simply providing a waiver for companies that, for example, ask to use a test they establish which achieves an equivalent level of safety? What, if any, fundamental requirements should be present in an acceptable company-specific drug abatement program, and what guidelines would the Coast Guard use in reviewing requests for waviers or amendments if such modifications are allowed? Should, for example, the Coast Guard be required to approve any modifications that are designed to achieve a safe and drug-free marine environment? Should these requirements or review guidelines be different from modifications submitted by small companies? Should the Coast Guard be required to act on an application for approval of a company-specific program, an amendment, or a waiver request, within a set time period? What form should the application take? What impact would allowing these alternatives for increasing flexibility have on the Coast Guard?

The Coast Guard invites comments as to what methods might be used to facilitate the inclusion of small entities in the program and whether all small entities should be required to develop and implement a drug abatement program. Commenters who believe that the proposed rule should not cover small entities, either in whole or in part, should explain the basis for their views and describe how they would define small entity for this purpose.

Employee Privacy

The Coast Guard specifically requests public comment on what, if any, procedures and safeguards should be prescribed to minimize the invasion of the privacy of the persons being tested. Since the provisions of 46 U.S.C. 7704 require revocation of the license, certificate of registry, or merchant mariners document of an individual convicted of violating a drug law or shown to be a user or addicted to drugs, the proposed rules would require that the Coast Guard be notified of all positive tests of individuals holding licenses, certificates, or documents. A second positive would result in revocation proceedings being initiated against an individual's license, certificate of registry, or merchant mariners document. Are there ways to ensure that an employer is aware of a person's past testing history without denying that person an appropriate level of confidentiality?

The Coast Guard is concerned with the circumstances under which test results would be given to persons other than the employer sponsoring the testing program or the employee. For example, should test results be submitted to a prospective employer? If so, should the data be given at the request of the future employer, at the discretion of the employer conducting the test, or at the request of the employee? Another option is authorizing the release of test results only in specified circumstances, such as cases where the employee had their license, certificate of registry, or merchant mariners document revoked after refusing to undergo rehabilitation or had failed a second test after rehabilitation.

The potential for the release of data may also complicate the issue of an employee's right to contest the results of a test. A urine sample that had been subject to tampering could unjustly end an employee's career even with another employer, and it might be necessary to permit the employee to challenge the integrity of the test procedure.

There are other persons who may wish to know the results of drug tests, and it may be appropriate to develop rules to govern the release of test data to them. For example, should the Coast Guard prohibit providing access to test results to the general public, including the news media? Does the Coast Guard have the authority to do so? What about access by other government agencies which might want data for statistical, regulatory, or law enforcement purposes?

A related issue involves whether to distinguish between releasing general statistical data, such as the total number of positive tests at a company in a month or year, and name-specific data. Small companies and their employees may have an especially difficult problem since small organizations will have fewer people to test at any given time period. It may be that even seemingly neutral statistical data would have the effect of identifying an individual. This potential may be exacerbated if only a small portion of the population is tested in a year.

Should the Coast Guard treat the privacy issue for the various testing programs differently?

The Coast Guard is proposing under some of the rehabilitation options discussed above that employees not be fired on the basis of a single positive drug test. As described elsewhere in this notice, the employee may have an opportunity for rehabilitation following the first positive drug test. If the employee declines to take advantage of this opportunity, or if the employee does not successfully complete rehabilitation, he or she may be fired and their license, certificate of registry, or merchant mariners document subject to suspension and revocation proceedings. If, however, following successful completion of rehabilitation, the employee again tests positive for drug use, the employee may be fired and the employee's license, certificate of registry, or merchant mariners document is subject to suspension and revocation proceedings without further opportunity for rehabilitation. This policy may involve some complications in practice. Implementation of the policy seems straightforward when an employer continuously employs the individual throughout the process, but in some instances employment is more transient, with many employees regularly moving from one employer to another. An employee might test positive with one employer and with or without having completed rehabilitation successfully, move on to another job. This possibility is great if the individual does not hold a license, certificate of registry, or merchant mariners document.

In these situations, how is the second employer to know of the first positive test, especially if the individual does not hold a license, certificate of registry, or merchant mariners document? How is a subsequent employer to know of a series of two positive tests with two different employers? What action should each of these parties take upon learning of a positive drug test or tests with a former employer?

One possible way of dealing with these questions is to require employers covered by these rules to require job applicants to disclose, in writing, all instances in which they have tested positive for drugs within a certain period of time. A false response would itself be grounds for firing the worker. Comments on the merits of this disclosure approach are requested. In addition, if this approach was used, to what period of time should the disclosure requirement refer? (e.g., one, two, or three years? Any time in the applicant's work history?) Should the disclosure requirement apply only to positive drug tests under the provisions of this rule, or should any positive drug test (e.g., one conducted in connection with athletics or school activities) have to be disclosed?

Another issue pertains to a situation in which an employer has hired an individual who the employer knows, perhaps through voluntary disclosure, to have had a prior positive drug test, and the employee again tests positive for drugs. Should the employer then be authorized to fire the worker, even though this is the first instance of a positive drug test while the worker has worked for the current employer? Should the employer treat the positive test as a "first positive test" and provide an opportunity for rehabilitation if the last prior positive test was a certain amount of time in the past (e.g., more than three years ago)?

What is the position of an employer confronted with an applicant for employment who tested positive twice within the disclosure period, but who at the time of his application is "clean" or alleges that he or she has been successfully rehabilitated? Should the employer refuse to hire (or, indeed, be barred from hiring) the applicant? (Where they apply, statutes prohibiting nondiscrimination on the basis of handicap, such as section 504 of the Rehabilitation Act of 1973, as amended, may forbid a refusal to hire a drug abuser unless the individual's current drug use poses a danger to persons or property.)

Regulatory Evaluation

These proposed regulations are considered to be non-major under Executive Order 12291 and significant under the DOT regulatory policies and procedures (44 FR 11034, February 26, 1979). A draft regulatory evaluation has been prepared and placed in the rulemaking docket. It may be inspected or copied at the Marine Safety Council (G–CMC/21) (CGD 86–067), Room 2110, U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593, from 8 a.m. to 3 p.m. Copies may also be obtained by referring to the "FOR FURTHER INFORMATION CONTACT" paragraph.

The proposed regulations would require proof of an individual's drug-free condition through the use of various testing programs. The proposed regulations mandate periodic urinalysis in connection with required physical examinations for licensed and documented personnel, and pre-employment and random sampling of all employees aboard any vessel on which licensed, certificated, or documented personnel are required. The testing programs also contain requirements concerning reasonable cause and post accident testing. Under the options proposed for comment, rehabilitation would be made available to certain personnel testing positive for drug use the first time, or those who volunteer for rehabilitation, with the opportunity to return to their previous position after undergoing a six month drug monitoring program. The Coast Guard does not believe these requirements will impose significant costs on either the private or public sectors, and the costs will normally be proportional to the size of the vessel or operation. There may be a substantial administrative burden on the operators of small vessels and some individuals.

Commenters should be aware that other operating administrations within the Department of Transportation also are proposing drug testing programs. Elsewhere in today's **Federal Register** are NPRMs issued by Urban Mass Transportation Administration and the Research and Special Programs Administration. In addition, the Federal Aviation Administration published an NPRM in the **Federal Register** on March 14, 1988 (53 FR 8368); the Federal Railroad Administration's NPRM was published on May 10, 1988 (53 FR 16640); and the Federal Highway Administration (FHWA) published its NPRM on June 14, 1988 (53 FR 22268). Each of these rulemakings addresses the costs and benefits of the proposals and are generally consistent with one another. In some instances, however, and generally as a result of differences in the industries affected, the assumptions differ from those discussed in this proposed rulemaking. Obviously, changes in assumptions could affect the costs and benefits. Because of the nature of some industries, costs for similar elements also may vary or could vary enough to warrant sensitivity analyses. Other changes in assumptions, such as test costs or rehabilitation costs, also can have an affect on the economic analyses. Commenters may find it helpful to review the notices of proposed rulemakings or the economic analyses prepared by the other operating administrations. Comparisons may aid commenters in reviewing data on this proposal and in formulating comments. In reviewing the economic analysis and the basic assumptions made, commenters should address specific areas where they agree or disagree with the assumptions and the basis for the comment. Commenters are directed to the other rulemakings and their assumptions as a source of information in submitting comments. A copy of each of the documents has been placed in the docket.

There were several alternatives considered. These included: Not addressing the problem in regulation or policy; only requiring periodic drug screens for personnel receiving physical examinations; requiring only pre-employment testing; requiring only random sampling programs; requiring only reasonable cause testing; requiring only post accident testing; having the Coast Guard or States conduct testing; or requiring random sampling programs in combination with periodic, pre-employment, reasonable cause, and post accident testing.

The last alternative was determined to be the most acceptable, since all crewmembers on vessels covered by the rules will be subject to random and pre-employment testing programs administered by employers, associations, and unions as well as providing for periodic testing of individuals holding licenses or merchant mariners documents. Random programs are believed to be the most effective method in deterring drug use because of the increased probability of detection. Concurrently, those personnel not subject to a random screening program for the prescribed period of time or those initially applying for employment in the merchant marine would still be screened for drug use. In addition, the evaluation of the role of drugs and alcohol in marine accidents will be possible. This approach facilitates program flexibility, increases probabilities of detection, eases the administrative burden, lowers cost, and provides greater effectiveness, while at the same time ensuring that all crewmembers on covered vessels are subject to testing.

Program Costs

The approximate costs (in constant 1986 dollars) of the regulatory proposal associated with the requirement for drug screening are as follows:

Periodic Testing

The estimated number of annual license and merchant mariners document transactions that require physical examinations (39,250), multiplied by the estimated cost of an initial drug screen ($25), gives the total costs of initial periodic drug test ($.98 million). Using that figure, and an assumed percentage of possible positive testings of 25%, gives an estimate of the number of required second, confirmatory testings (9,812). Using a cost of $60 per confirmatory screen the average annual cost expected for confirmatory tests is $.59 million. The total estimated annual cost of the periodic drug screening would be $1.57 million.

If all the individuals subject to periodic testing are enrolled in employer-sponsored or equivalent testing programs, and therefore eligible for testing at costs comparable for pre-employment and random sampling ($15 for initial tests, and $25 for confirmatory tests), the total estimated annual cost of the periodic screening would be reduced to $.84 million.

It should be noted that these testing costs do not take into consideration those individuals obtaining raises of grade who have had physical examinations for original licenses or renewals within three years nor those individuals holding First Class Pilot licenses but not serving on them and therefore not required to receive an annual physical examination. Actual costs are therefore expected to be less than those shown above.

Preemployment Testing Programs

Due to the career paths of many mariners, the costs of a preemployment testing program are extremely difficult to assess. Computation of the program's estimated cost will be dependent on how preemployment testing is applied and whether or not unions and other organizations are to be considered employers.

It is estimated that 131,700 individuals are employed on vessels on which licensed, certificated, or documented personnel are required. Until comments are received relative to application of this program, it is assumed, for purposes of the evaluation, that 10 percent of the total individuals are new to the industry each year, and, of the remainder, 20 percent change employers each year. Therefore, an estimated 36,876 mariners would receive preemployment testing annually.

Multiplying the number of mariners tested by the cost of an initial drug screen ($15), it will cost $.55 million for initial preemployment drug tests. Assuming a need to confirm a percentage of possible positive testings of 25%, the projected number of required second, confirmatory testing is 9,219. Multiplying this figure times the estimated cost of confirmatory tests ($25), it is estimated that it will cost $.23 million for confirmatory testing. With an average annual administrative cost of sample testing of $.23 million (36,876 + 9,219 x $5), the total estimated annual cost of the preemployment testing program is $1.01 million.

(Note.—Estimated testing cost is lower for preemployer testing than periodic testing due to volume contracts.)

Random Sampling Programs

(Note.—A 125% random selection rate is used for this analysis. This is the same rate used by the Coast Guard for testing its military personnel. If a lower rate is adopted in the final rule, the following costs will be correspondly less.)

The total annual cost of the random sampling program is estimated to be $4.5 million. This was arrived at by assuming that out of an estimated affected population of 131,700 seamen, 125 percent are to be tested each year. Therefore, 164,625 samples are to be tested annually. Multiplying this figure times the estimated cost of an initial drug screen ($15), it will cost $2.5 million for initial random drug tests. Assuming a need to confirm a percentage of possible postive testings of 25%, the projected number of required second, confirmatory testing is 41,156. Multiplying this figure times the estimated cost of confirmatory tests ($25), it is estimated that it will cost $1 million for confirmatory testing. With an average annual administrative cost of sample testing of $1 million (164,625 + 41,156 x $5), the total estimated annual cost of the random testing program is $4.5 million.

(Note.—Estimated testing cost is lower for random sampling than periodic testing due to volume contracts.)

Reasonable Cause Testing

Reasonable cause testing is discretionary, highly subjective, and contingent on the availability of more than one supervisor, as well as the level of training of the supervisor(s). In addition, there is little or no data available concerning the incidence of drug use in the commercial marine industry. For these reasons, it is difficult to estimate the number of instances in which such testing would be potentially necessary or undertaken, nor is it possible to accurately assess the cost/benefit impacts of such testing.

In general, however, it is evident that the primary value of reasonable cause testing is its potential capability for detecting and determining drug use prior to the occurrence of marine casualties or other significant events. It is not possible to estimate how many such incidents could be prevented. As discussed later, if even a small percentage of deaths, injuries, or property/environmental damage is prevented through reasonable cause testing, the benefits will outweigh the associated costs.

As an estimate, it is believed that up to 7.5 percent of the seamen covered by this program could be tested annually. The total annual cost of the reasonable cause testing is therefore estimated to be $.27 million. This was arrived at by assuming that out of an estimated affected population of 131,700 seamen, and a testing rate of 7.5 percent, 9,878 samples are to be tested annually. Multiplying this figure times the estimated cost of an initial drug screen ($15), it will cost $.15 million for initial drug tests. Assuming a need to confirm a percentage of possible positive testings of 25%, the projected number of required second, confirmatory testings is 2,470. Multiplying this figure times the estimated cost of confirmatory tests ($25), it is estimated that it will cost $.06 million for confirmatory testing. With an average annual administrative cost of sample testing of $.06 million (9,878 + 2,470 x $5), the total estimated annual cost is $.27 million.

Post Accident Testing

Based on historical data, there are approximately 4800 marine casualties per year. Of these, approximately 1900 can be considered "serious marine incidents." It is estimated that, for various reasons, only 75 percent of the serious marine incidents will be able to conduct testing in a timely and efficient manner. The following costs are estimated for those 1425 incidents where testing will occur.

Of the estimated 1425 serious marine incidents occurring each year and where testing will be possible, it is estimated 66 percent (950) will occur in locations where blood and urine samples can be collected at American medical facilities within 24 hours. Using an estimate of three (3) persons being tested in each incident, 2850 samples will have to be taken. Multiplying that number by the estimated medical fees for obtaining the samples ($50 per sample), the cost of transporting personnel to be tested ($50 per individual), and the cost of shipping the samples to an approved laboratory ($50 per sample), it is estimated that it will cost $.43 million to conduct this testing. Adding this number to the cost of analyzing the samples ($100 per sample), it is estimated that it will annually cost $.72 million to conduct this type of testing.

Of the estimated 1425 serious marine incidents occurring each year and where testing will be possible, it is estimated 33 percent (475) will occur in locations where urine samples can only be collected by ship's crew. Using an estimate of three (3) persons being tested in each incident, 1425 samples will have to be taken. Multiplying that number by the estimated cost of shipping the samples to an approved laboratory ($50 per sample), it is estimated that it will cost $.07 million to conduct this testing. Adding this number to the cost of analyzing the samples ($100 per sample), it is estimated that it will annually cost $.21 million to conduct this type of testing.

In addition to the testing, the cost of providing shipboard sample kits and EBTs are necessary. It is estimated 35,000 kits will be purchased at a cost of $25 apiece for a one time cost of $.88 million. Each year, due to accidents, 1425 kits would have to be restocked for a cost of $.04 million. Additionally, there are approximately 1600 vessels certificated for unrestricted ocean routes, or for restricted overseas routes, which will provide an EBT at an approximate cost of $440 apiece, for a total cost of $.7 million. Training for personnel to use EBT (approximately 9600 people) is estimated to be $4.8 million if it costs $500 to train each one. The total equipment and training costs will be approximately $5.72 million.

The costs of the post casualty testing requirements is $6.65 million.

Rehabilitation

The costs involved with rehabilitation and drug monitoring are difficult to compute since the type of services available vary with the drug involved. Also, the number of personnel who will take advantage of the opportunity for rehabilitation are unknown. However, the following are offered as estimates for the total costs of Option 1, the broadest option under consideration.

(Note—The detection rate used for this analysis is based on a 125% random selection rate. If a lower random selection is adopted in the final rule, the detection rate, and the following costs, will be correspondingly less.)

The number of persons employed on vessels required to have individuals holding a license, certificate of registry, or merchant mariners document is estimated to be 131,700. Multiplying that number by .075 (7.5 percent estimated detection rate), the total number of personnel who could be eligible for rehabilitation is 9,878. Multiply that number by .33 (33 percent) to determine the number of personnel who are eligible for, and undergo, rehabilitation (3,260). An estimated 67 percent of detected drug users will not undergo rehabilitation because they: (1) Refuse to be rehabilitated; (2) are not eligible for rehabilitation because they are temporary employees; (3) will decline the opportunity for rehabilitation; or (4) will be subject to termination of employment and/or subject to suspension or revocation proceedings because they tested positive for drug use a second time. This percentage applies to the marine industry and reflects the composition of its workforce.

Multiply that figure by the maximum estimated cost for an in-patient rehabilitation program ($13,000) to receive the estimated annual cost for in-patient rehabilitation ($42.4 million). The Coast Guard is proposing that all persons undergo in-patient rehabilitation. 46 U.S.C. 7704 mandates that a person be "cured" in order to forego revocation of their license, certificate of registry, or merchant mariners document. Since many individuals detected for drug use may not require full in-patient care, lowering this 100% requirement to another percentage, e.g. 5% as has been used by the FAA in their NPRM (March 14, 1988, 53 FR 8368), would decrease the costs substantially.

Multiply the number of individuals undergoing rehabilitation by the maximum estmated cost for a six month out-patient monitoring program ($1,800) to determine the cost of out-patient rehabilitation ($5.9 million). The total annual estimated cost of rehabilitation is $48.3 million.

No estimate is offered for the costs of employing an individual during rehabilitation or rehiring them after rehabilitation. There is no requirement that the individual be paid during rehabilitation, therefore, the costs of paying an employee during rehabilitation will depend totally upon company policy or the labor agreement an employer has with the employee. Costs can range from the price of the rehabilitation solely, to full pay up to six months or more.

Administrative costs will also vary, being dependent upon the type of program an employer adopts. However, for the majority of employers, it is believed the administrative costs will be minimal since most employers will contract out for rehabilitation services and include the administrative costs in the total rehabilitation cost.

Option four, which does not mandate any type of rehabilitation program, would have negligible costs.

Transportation

Periodic, Preemployment, Random and Reasonable Cause Testing: The costs associated with transportation and test taking are difficult to accurately calculate since such numbers are entirely dependent upon whether the merchant mariner will have to go to a laboratory or other facility for testing or whether test samples will be collected incident to employment. Many sample takings will be conducted during an individual's free time, since the requirement for a test is for a personal license, certificate, or document. However, it is assumed that, for the most part, mariners will be within one-half hour of a testing facility when located at their residence, place of employment, or Regional Examination Center, and that it should take fifteen minutes to complete a test. Therefore, it is projected that it will take a typical mariner one and one-quarter hours to complete this requirement, with the majority of testing during an individual's free time. Also many employers currently have some type of testing program in place that, with little or no program alteration, may meet the criteria the Coast Guard is proposing.

Rehabilitation: The costs associated with transportation are difficult to accurately calculate since such numbers are entirely dependent upon whether the merchant mariner will have to visit a rehabilitation or monitoring center or whether the employer will have a program run at the place of employment. However, it is assumed that, for the most part, mariners will be within one-half hour of a rehabilitation or monitoring facility when located at their residence or place of employment. Therefore, it is projected that it will take a typical mariner one hour travel to complete this requirement, with the majority of this time during an individual's free time.

Option four, which does not mandate any type of rehabilitation program, would have negligible costs unless an employer chose to provide for rehabilitation voluntarily.

Post casualty Testing: For the 1425 serious marine incidents after which toxicological sampling will be feasible, it is estimated that an average of 1 hour will be required to transport individuals to and from medical facilities for blood and urine sampling following approximately 950 incidents, and 1 hour will be required for collecting samples. An estimated 3 persons will be subject to sampling for each incident. This will result in 5700 hours expended by the persons being tested. Also an estimated 2 supervisory personnel will be necessary for witnessing and documentation. These individuals would require 1 hour for the round trip to the medical facility, 1 hour at the medical facility, and 1 hour for completing documentation and for arranging shipment of samples to the designated laboratory. This would result in 5700 hours expended by supervisory personnel. The total hours associated with obtaining blood and urine samples at medical facilities would be 11,400 hours.

It is estimated that toxicological sampling aboard vessels will occur following approximately 475 serious marine incidents. An estimated 3 persons per incident would be subject to sampling, and 0.5 hour would be required for the urine sampling and breath alcohol testing procedure. This would result in 713 hours expended by persons providing samples. An additional 2 supervisory personnel would participate for witnessing and documenting the sampling. Approximately 0.5 hour per person sampled and tested would be expended by the supervisors, as well as 0.5 hour for completing required documentation. This would result in 950 hours expended by supervisory personnel. Finally, delivery of samples to a shipping location upon reaching port would require one person approximately 1.5 hours roundtrip. This would result in 713 hours expended in shipment of samples. The total hours associated with obtaining urine samples and conducting breath alcohol testing aboard vessels would therefore be 2376 hours.

The total hours required to support the proposed requirements for drug and alcohol testing following serious marine incidents would be 11,400 + 2376 = 13,776 hours.

Total Cost

The total first year maximum cost of the drug testing programs, plus the cost of rehabilitation, is estimated to be:

	Million
Periodic testing	$1.57
Preemployment testing	1.01
Random testing	4.50
Reasonable cause testing	0.27
Post casualty testing	6.66
Rehabilitation	48.30
Total	62.30

Based on experience with in place chemical testing programs, such as DOD and the Coast Guard, the percentage of persons testing positive should drop significantly over a period of time. Since the worker population in the marine industry is highly mobile as compared to servicemen in the armed forces, no prediction can be made as to how fast this decrease in positive test results will occur. Therefore, it has been assumed that costs will decrease constantly over the first three years, and thereafter costs for confirmation tests and rehabilitation should decrease to 33% of the amounts calculated above, thereby reducing the costs in subsequent years to approximately $22 million.

Program Benefits

As shown in a June 1984 U.S. Department of Health and Human Services report entitled *Economic Costs to Society or Alcohol and Drug Abuse and Mental Illness: 1980*, the economic costs to society at large from drug abuse is estimated to be $66 billion annually. Using this annual figure, the total cost to society from drug abuse over the 10-year period following 1988 would be $405.5 billion more if corrective measures are not taken. Over 50 percent of the $66 billion estimate of the cost of drug abuse in society at large is in the form of reduced income of drug users compared with those who do not use drugs. Is it reasonable to assume that a corresponding percentage of benefits would result from increased productivity of the covered marine employers? Are there more accurate estimates and estimating methodologies that should be used in estimating the potential benefits associated with this proposal? The Coast Guard has placed the 1984 report in the public docket, and invites commenters to submit their views on the applicability of the study's conclusion to this notice.

Although revisions to the casualty reporting program have recently been effected, existing data does not readily identify drug-related casualties; therefore, the Coast Guard will not estimate the total cost benefits of this proposal at this time. However, the following must be kept in mind. In 1984 there were approximately 2300 commercial vessel casualties (excluding fishing vessels), resulting in $237 million in damages and 66 deaths. Of these, 1133 were directly attributable to personnel-related causes, i.e. carelessness, misjudgment, etc., resulting in $77 million in damages and 29 deaths. (It should be noted that these statistics do not include personnel deaths or injuries which are not associated with vessel accidents.)

The Coast Guard believes that if drug screening can prevent even a low percentage of these accidents through drug testing and rehabilitation, the program will more than pay for itself. Using the minimum accepted value of a human life of one million dollars, the saving of but a few lives annually, along with reduced property damage, will more than match the cost of the proposed program. This goal is believed achievable, given the success of other drug testing programs.

Regulatory Flexibility Analysis

The costs of the proposed random sampling will be proportional to the number of personnel employed. For small vessels, having only two or three affected crew members, the cost should be in the range of $100 to $300 per year. For post-accident testing, the cost would basically be $25 for a sampling and shipping kit. However, as discussed previously in the preamble, even this seemingly low amount may have an adverse impact on small entities. Since the Coast Guard is considering a number of alternatives to this proposal for small entities, it is not possible to evaluate the economic impact at this time. The Coast Guard has solicited comment on the impact on small entities and will consider those responses and evaluate the impact prior to issuing a final rule.

Federalism Assessment

This regulatory proposal has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The proposed rules affect the safety of vessels in interstate and foreign commerce and are directly related to the qualifications of personnel licensed by the U.S. Coast Guard and their working conditions on vessels. These are express statutory responsibilities of the U.S. Coast Guard and there are no similar State responsibilities or programs in these areas.

Information Collection

This proposed rulemaking contains information collection requirements in the following sections proposed: Proposed subparts B and C, plus proposed sections 46 CFR 4.06-1 and 4.06-8. They are being submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et. seq.*) Persons desiring to comment on these information collection requirements should submit their comments to: Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, ATTN: Desk Officer, Coast Guard. Persons submitting comments to OMB are also requested to submit a copy of their comments to the Coast Guard as indicated under "ADDRESS."

Commenters should especially provide their views on the accuracy of Coast Guard's estimates of the burdens associated with these requirements, the practical utility of the information obtained, and less burdensome reporting alternatives to those proposed in this notice.

List Of Subjects

46 CFR Part 4

Administrative practice and procedures, Investigations, Accidents, Marine safety, National Transportation Safety Board, Reporting requirements, Alcohol and alcoholic beverages, Drugs

46 CFR Part 5

Administrative practice and procedures, Investigations, Administrative law judge, Investigating officer, Seamen, License, Certificate, Document, Rehabilitation, Administrative hearings, Navigation (Water), Suspension and revocation, Marine safety, Alcohol and alcoholic beverages, Drugs.

46 CFR Part 16

Seamen, Marine safety, Navigation (Water), Rehabilitation, Navigation (Water), Alcohol and alcoholic beverages, Drugs.

Proposed Rule

For the reasons set out in the preamble, Title 46, Chapter I, of the Code of Federal Regulations, is proposed to be amended as follows:

PART 4—[AMENDED]

1–2. The authority citation for Part 4 is revised to read as follows:

Authority: 33 U.S.C. 1231, 43 U.S.C. 1333; 46 U.S.C. 103, 2306, 6101, 6301, 6305, 50 U.S.C. 198; 49 CFR 1.46, except subpart 4.40 for which the authority is: 49 U.S.C. 1903(a)(1)(E); 49 CFR 1.46.

3. Subpart 4.03 is amended by adding §§ 4.03–2, 4.03–4, 4.03–5, and 4.03–6 to read as follows:

§ 4.03–2 Serious marine incident.

The term "serious marine incident" includes the following events involving a commercial vessel:

(a) Any marine casualty as defined in § 4.03–1 of this part which results in any of the following:

(1) One or more deaths;

(2) An injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and in the case of a person employed aboard a commercial vessel, which renders the crewmember unfit to perform routine or emergency vessel duties;

(3) Damage to property, as defined in § 4.05–1(f) of this part, in excess of $100,000;

(4) Actual or constructive total loss of any vessel subject to inspection under 46 U.S.C. 3301; or

(5) Actual or constructive total loss of any self-propelled vessel, not subject to inspection under 46 U.S.C. 3301, of 100 GT or more.

(b) A discharge of oil of 10,000 gallons or more into the navigable waters of the United States, as defined in 33 U.S.C. 1321, whether or not resulting from a marine casualty.

(c) A discharge of a reportable quantity of a hazardous substance into the navigable waters of the United States, or a release of a reportable quantity of a hazardous substance into the environment of the United States, whether or not resulting from a marine casualty.

§ 4.03–4 Person directly involved in a marine casualty or serious marine incident.

The term "person directly involved in a marine casualty or serious marine incident" is a person who supervises, performs assigned duties in connection with, or otherwise actively participates in, any vessel operation or any activity occurring aboard a vessel which is a significant factor in the events leading to or causing a casualty or serious marine incident. The term "person directly involved in a marine casualty or serious marine incident" also includes any individual serving aboard a commercial vessel who is fatally injured or who is injured to the degree specified in § 4.03–2 of this part.

§ 4.03–5 Medical facility.

The term "medical facility" means an American hospital, clinic, physician's office, or laboratory, where blood samples can be collected according to recognized professional standards and urine samples can be collected consistent with 46 CFR 16.301.

§ 4.03–6 Qualified medical personnel.

The term "qualified medical personnel" means a physician, physician's assistant, nurse, emergency medical technician, or other person authorized under State or Federal law to collect blood and urine specimens.

4. Section 4.05–1 is amended by revising paragraph (e) to read as follows:

§ 4.05–1 Notice of marine casualty.

* * * * *

(e) Injury which requires professional medical treatment beyond first aid and, in the case of a person employed on board a commercial vessel, which renders the crewmember unfit to perform routine or emergency vessel duties.

* * * * *

5. A new Supart 4.06 is added to read as follows:

Subpart 4.06—Mandatory Drug and Alcohol Testing Following Serious Marine Incidents Involving Commercial Vessels

Sec.
4.06–1 Responsibilities of the marine employer.
4.06–5 Responsibilities of persons directly involved in serious marine incidents.
4.06–10 Blood and urine sample collection at a medical facility or by qualified medical personnel.
4.06–15 Testing with evidential breath testing devices (EBTs).
4.06–20 Urine sample collection by the marine employer.
4.06–25 Sample collection in incidents involving fatalities.
4.06–30 Sample handling and shipping.
4.06–35 Sample analysis and follow-up procedures.
4.06–40 Reporting and review of results.
4.06–45 Employee Assistance Programs (EAPs).

Subpart 4.06—Mandatory Drug and Alcohol Testing Following Serious Marine Incidents Involving Commercial Vessels

§ 4.06–1 Responsibilities of the marine employer.

(A) All commercial vessels.

(1) Following the occurrence of a marine casualty, a discharge of oil into the navigable waters of the United States, a discharge of a hazardous substance into the navigable waters of the United States, or a release of a hazardous substance into the environment of the United States, the marine employer shall make a timely, good faith determination as to whether the occurrence currently is, or is likely to become, a serious marine incident.

(2) When it is determined that a casualty or incident has occurred that meets, or is likely to meet, the criteria in § 4.03–2, the marine employer shall take all practicable steps to assure that any person directly involved in the casualty or incident is transported to a medical facility or to qualified medical personnel for the purpose of obtaining blood and urine samples as soon as possible, or to transport qualified medical personnel to the vessel for the same purpose as soon as possible, when it is feasible to do so within 24 hours after the incident. This requirement shall not be construed to inhibit those vessel personnel required to be tested from performing duties in the aftermath of a serious marine incident, when such performance is necessary for the preservation of life or property, or the protection of the environment.

(3) The marine employer shall ensure that a blood and urine sampling and shipping kit meeting the requirements of § 4.06–30 of this part is readily available for use following serious marine incidents. The sampling and shipping kit need not be maintained aboard each vessel if it can be made available for sampling at a medical facility or by qualified medical personnel within 24 hours from the time of the occurrence of the serious marine incident.

(4) The marine employer shall ensure that all employees serving aboard vessels are fully indoctrinated in the requirements of this subpart, and that appropriate licensed vessel personnel are trained as necessary in the practical applications of these requirements.

(5) The marine employer shall submit the following information on Form CG–2692B (Toxicological Sampling Report) to the Coast Guard after a serious marine incident:

(i) Name of vessel, official number, date and location of serious marine incident.

(ii) Names and other identifying data for each person directly involved in the serious marine incident.

(iii) Exact information concerning location and duties of each person directly involved at the time of the serious marine incident.

(iv) Whether or not sampling or testing was conducted. If not, an explanation concerning why sampling or testing was not conducted.

(v) The names and other identifying data for each person from whom urine or blood samples are obtained or who undergoes breath testing.

(vi) Location of sampling or testing, either aboard vessel or ashore. If ashore at a medical facility, name and address of facility.

(vii) Type of sampling or testing conducted. If breath alcohol test was conducted aboard vessel, specific results of the test.

(viii) Identification of medical or vessel personnel conducting sampling or testing.

(ix) Identification of medical or vessel personnel witnessing sampling or testing.

(x) Exact disposition of all blood or urine samples following sampling (i.e. information concerning shipment to laboratory).

(6) Following a serious marine incident, the Form CG–2692B shall be submitted as soon as possible to the Officer in Charge, Marine Inspection (OCMI), at the port in which the incident occurred or nearest the port of first arrival. When blood or urine sampling is conducted, a copy of the form shall be forwarded to the designated laboratory with the samples.

(b) Inspected vessels certificated for ocean or overseas routes.

(1) When a serious marine incident occurs involving an inspected vessel certificated for unrestricted ocean operations or involving an inspected vessel certificated for a restricted overseas route, and it does not appear feasible to transport involved personnel to a medical facility or to qualified medical personnel within 24 hours, the marine employer shall ensure that urine samples are collected and breath tests administered on board the vessel as soon as possible for any person directly involved in the casualty incident. Breath testing and urine sampling shall be conducted in accordance with the procedures outlined in §§ 4.06–15 and 4.06–20 of this part.

(2) When a person directly involved in a serious marine incident cannot be transported to a medical facility or to qualified medical personnel, and the person is unconscious or otherwise unable to indicate consent in providing urine samples or participate in breath testing, the marine employer is not required to attempt to conduct breath testing or to obtain urine samples on board the vessel.

§ 4.06–5 Responsibilities of persons directly involved in serious marine incidents.

(a) Any individual employed aboard any vessel on which an individual is required by law or regulation to be licensed, certificated, or documented under Subpart B of this chapter, who is determined to be directly involved in a serious marine incident by their marine employer or a law enforcement officer, shall provide a blood, urine, or breath sample when directed to do so by a marine employer or law enforcement officer.

(b) Under § 16.110 of this chapter, any individual employed aboard any vessel on which an individual is required by law or regulation to be licensed, certificated, or documented, is deemed to have given his or her consent to toxicological sampling following serious marine incidents. No individual may be forcibly compelled to provide blood, urine, or breath samples, however, refusal or failure to submit to sampling is considered a violation of regulation and will subject the individual to suspension and revocation proceedings under Part 5 of this chapter, and/or termination of employment.

§ 4.06–10 Blood and urine sample collection at a medical facility or by qualified medical personnel.

(a) When obtaining blood and urine samples under this subpart, the marine employer shall comply with the requirements of this subpart and shall ensure that the collection process is supervised by either qualified medical personnel from the medical facility, the marine employer, a law enforcement officer, or the marine employer's representative.

(b) When urine samples are collected at a medical facility or by qualified medical personnel, the marine employer shall ensure that the collection procedures specified in 46 CFR 16.301 are followed to the extent practicable. Certification of the sampling process and documentation of the chain of custody shall be accomplished through proper completion of applicable portions of the Form CG–2692B (Toxicological Sampling Report).

(c) When compliance with any procedure specified in 46 CFR 16.301 is not feasible, the marine employer shall provide an explanation of the circumstances on the Form CG–2692B.

(d) Blood samples shall only be drawn by qualified medical personnel. The marine employer shall ensure that the following procedures are observed after collection of blood samples:

(1) The individual providing the sample and the person supervising the process shall keep the blood specimen in view at all times prior to the sample being sealed and labeled. If the specimen is transferred to a second container, the person supervising the process shall request that the individual providing the sample observe the transfer.

(2) The person supervising the process shall request that the individual witness the sealing of the blood specimen tube with evidence tape placed over the cap and down the sides. The individual shall also be requested to initial the blood specimen tube and to witness the labeling of the tube. The person supervising the process shall label the tube with the time and date, the individual's full name, and specimen number if assigned.

(3) Certification of the sampling process and documentation of the transfer of the chain of custody of blood samples must be accomplished through proper completion of the Form CG–2692B (Toxicological Sampling Report).

(e) The marine employer shall ensure that blood samples are promptly shipped to the designated laboratory following collection in accordance with procedures outlined in 46 CFR 4.06–30, and that urine samples are shipped according to 46 CFR 16.301.

(f) In the case of an injured individual from whom samples are required, the marine employer shall request that the treating medical facility obtain the necessary samples. If an injured employee is unconscious or otherwise unable to indicate consent to the sampling procedure, and the medical facility declines to obtain a blood sample after having been advised of the requirements of this subpart, the marine employer shall immediately notify the nearest Coast Guard Officer in Charge of Marine Inspection (OCMI).

(g) Nothing in this subpart shall be construed as limiting the discretion of qualified medical personnel to determine whether drawing a blood sample is neither medically acceptable or advisable.

§ 4.06–15 Testing with evidential breath testing devices (EBTs).

(a) All inspected vessels certificated for unrestricted ocean routes, and all inspected vessels certificated for restricted overseas routes, are required to have on board at all times an evidential breath testing device (EBT). EBTs must be selected from among those listed on the Conforming Products List of Evidential Breath Measurement Devices amended and published periodically by the National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

(b) The marine employer shall ensure that evidential breath measurement devices are maintained and calibrated through the use of a unit listed on the

NHTSA Conforming Products List of Calibrating Units for Breath Alcohol Testers. The marine employer shall ensure that calibration is performed with sufficient frequency to ensure the accuracy of the device, but not less frequently than provided for in the manufacturer's instructions.

(c) The marine employer shall ensure that breath testing is conducted through the use of an approved testing device. Breath testing must only be conducted by a person trained and qualified to operate the breath measurement device. The marine employer shall ensure that appropriate vessel personnel receive formal instruction in the following subject areas prior to being considered qualified operators of breath testing devices:

(1) The effects of alcohol on the body, including absorption, distribution, and elimination phases.

(2) Scientific concepts and technology of breath testing as a means for determining blood alcohol concentration in the human body, as well as theoretical and practical qualities of the particular breath testing device selected by the marine employer.

(3) Practical laboratory exercises involving the operation and calibration of the selected testing device.

(d) The marine employer shall ensure that operators of breath testing devices receive periodic refresher training following their initial qualification.

(e) The marine employer shall ensure that breath testing is conducted in accordance with procedures specified by the manufacturer of the testing device, consistent with sound technical judgment, and shall include appropriate restrictions on ambient air temperature.

(f) If a test indicates a BAC of .02 or more, the individual must be tested again after the expiration of a period of 15 minutes, in order to ensure that the test has properly measured the alcohol content of deep lung air.

(g) Because of the inherent limitations of instrumentation, any indicated breath test result of less than .02 percent is deemed a negative test.

§ 4.06-20 Urine sample collection by the marine employer.

(a) When urine samples are collected by the marine employer, the marine employer shall ensure that the collection procedures specified by 46 CFR 16.301 are followed to the extent practicable. Certification of the sampling process and documentation of the transfer of the chain of custody shall be accomplished through the proper completion of applicable portions of the Form CG-2692B (Toxicological Sampling Report).

(b) When compliance with any procedure specified by 46 CFR 16.301 is not feasible, the marine employer shall provide an explanation of the circumstances on the Form CG-2692B.

(c) The marine employer shall ensure that urine samples are promptly shipped to the designated laboratory as soon as the vessel reaches a location from which the requirements of 46 CFR 16.301 may be satisfied.

§ 4.06-25 Sample collection in incidents involving fatalities.

(a) In the case of a fatality occurring to the covered employee of a marine employer as a result of a marine casualty, body fluid samples must be obtained from the remains of the employee for chemical testing, if practicable to do so at an appropriate medical facility. To ensure that samples are obtained in a timely manner, the marine employer shall notify the appropriate local authority, such as the coroner or medical examiner, as soon as possible, of the fatality and of the requirements of this subpart. The marine employer shall make available the sampling and shipping kit and request that the local authority assist in obtaining the necessary body fluid samples. The marine employer shall also seek the assistance of the custodian of the remains, if a person other than the local authority.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary samples, the marine employer shall immediately notify the nearest Coast Guard Officer in Charge of Marine Inspection (OCMI) with the pertinent information.

§ 4.06-30 Sample handling and shipping.

(a) As a minimum, a toxicological sampling and shipping kit must have:

(1) Six (06) 4 ounce plastic urine specimen bottles with tight fitting screw-type lids,

(2) Twelve (12) 10 milliliter evacuated blood specimen tubes containing potassium oxalate and sodium fluoride for sterile preservation,

(3) A cardboard box suitable for shipping, measuring approximately 11 inches x 8 inches x 11 inches, which contains an inner styrofoam liner,

(4) A sealable quart can for ice,

(5) A roll of evidence tape or other appropriate moisture-resistant, stick-on labels for marking specimen bottles and tubes, and,

(6) A set of Forms CG-2692B in triplicate, and

(7) A sealable plastic bag for protection of forms or documents being placed in the shipping box.

(8) A 3-tube styrofoam blood sample mailer.

(b) The marine employer shall ensure that blood samples collected at a medical facility or by qualified medical personnel are shipped in a cooled condition by pre-paid air freight (or other means adequate to ensure delivery within twenty-four (24) hours) to a designated laboratory.

(c) Urine samples need not be shipped in a cooled condition by overnight delivery. The marine employer shall ensure that urine samples are shipped by the next most expeditious means available.

(d) The marine employer shall ensure that the shipping kit containing blood or urine samples is securely sealed with tape and shall sign and date across the tape.

(e) The marine employer shall ensure that a copy of form CG-2692B, completed in accordance with § 4.06-1(a)(5), if forwarded in the shipping kit along with blood or urine samples.

(f) Samples shall be shipped to a laboratory approved by the Department of Health and Human Services.

§ 4.06-35 Sample analysis and follow-up procedures.

Each laboratory will provide prompt analysis of samples collected under this subpart, consistent with the need to develop all relevant information and to produce a complete analysis report. A urine sample which indicates the presence of a dangerous drug at a level equal to or exceeding the levels established by 46 CFR 16.301 is considered a positive indication of prior drug use by the individual providing the sample. A blood sample indicating any concentration of alcohol is considered a positive indication of prior alcohol use by the individual providing the sample. Analysis results which indicate the presence of alcohol or drugs shall not be construed by themselves as constituting a finding of the probable cause of a serious marine incident.

§ 4.06-40 Reporting and review of results.

The reporting and review of the results of urine tests for drug use shall proceed as provided by 46 CFR 16.301.

§ 4.06-45 Employee Assistance Programs (EAPs)

The marine employer shall follow the requirements of 46 CFR 16.310, which concern employee assistance programs and rehabilitation.

PART 5—[AMENDED]

6. The authority citation for Part 5 continues to read as follows:

Authority: 46 U.S.C. 7101, 7301, and 7701; 50 U.S.C. 198; 49 CFR 1.46(b).

7. In § 5.569 add to Table 5.569 the following new offense after Incompetence:

§ 5.569 Selection of an appropriate order.

* * * * *

Table 5.569—Suggested Range of an Appropriate Order:

Type of offense	Range of order (in months)
* * * *	*
Violation of Regulation:	
Failure to submit to required chemical test	12-24
* * * *	*

8. A new Part 16 is added to Subchapter B to read as follows:

PART 16—CHEMICAL TESTING

Subpart A—General

Sec.
16.101 Purpose of regulations.
16.105 Definitions of terms used in this part.
16.110 Implied consent.

Subpart B—Required Chemical Testing

Sec.
16.201 Application.
16.205 Events requiring chemical testing.
16.210 Required random sampling programs.

Subpart C—Standards

Sec.
16.301 HHS guidelines.
16.305 General.
16.310 Employee Assistance Program (EAP).

Authority: 46 U.S.C. 2103, 3306, 7101, 7301, and 7701; 49 CFR 1.46(b).

Subpart A—General

§ 16.101 Purpose of regulations.

(a) The intent of the regulations in this part is to provide a means to minimize the use of dangerous drugs by merchant marine personnel and to promote a drug free and safe work environment.

(b) The regulations in this part delineate the minimum standards, procedures, and means necessary to test for the use of dangerous drugs.

(c) Nothing in this part is intended to limit an employer's ability to set lawful standards, procedures or means of testing employees for the use of dangerous drugs in excess of the requirements contained in this Part.

§ 16.105 Definitions of terms used in this part.

"Chemical Test" means a scientifically recognized test which analyzes an individual's breath, blood, urine, and/or saliva for evidence of dangerous drug and/or alcohol use.

"Dangerous Drug" means a narcotic drug, controlled substance, or marijuana (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802)).

"Dangerous Drug Level" means the amount of traces of dangerous drugs or their metabolites in an individual's breath, blood, urine, and/or saliva.

"Preemployment Testing Program" means a preemployment testing program which is sponsored and administered by an employer or sponsoring organization.

"Random Sampling Program" means a random sampling program which is sponsored and administered by an employer or sponsoring organization, and satisfies the criteria contained in Subpart B of this part.

"Sponsoring Organization" is any company, corporation, association, union, or other organization with which individuals serving in the marine industry, or their employers, are associated.

"Urinalysis" means a chemical test of an individual's urine for dangerous drugs.

"Vessel Owned in the United States" means any vessel documented or numbered under the laws of the United States; and, any vessel owned by a citizen of the United States that is not documented or numbered by any nation.

§ 16.110 Implied consent.

(a) Any individual applying for, or acting under the authority of, a license, a certificate of registry, or a merchant mariners document issued under Subchapter B of this chapter after [the effective date of this rule], is deemed to have given his or her consent to testing as required by this part. Any individual accepting employment on board any vessel owned in the United States on which any individual is required by law or regulation to be the holder of a license, certificate of registry, or merchant mariners document, is also deemed to have given his or her consent to testing under this part.

(b) Each individual subject to paragraph (a) of this section shall participate in testing as required under conditions set forth in this part, in Part 4 of this chapter, and in 33 CFR Part 95. Refusal or failure to participate is considered a violation of regulation and will subject the individual to suspension or revocation of his or her license, certificate, or document under the procedures contained in Part 5 of this chapter and/or termination of employment.

(c) When an individual is required to be tested under Part 4 of this chapter or 33 CFR Part 95, and is taken to a medical facility for observation or treatment after a marine casualty or incident, that individual shall be deemed to have consented to the release to the Coast Guard of the following:

(1) The remaining portion of any body fluid sample taken by the treating facility within 24 hours of the accident or incident that is not required for medical purposes, together with the medical facility record(s) pertaining to the taking of such sample;

(2) The results of any laboratory tests conducted by or for the treating facility on such sample; and

(3) The identity, dosage, and time of administration of any drugs administered by the treating facility prior to the time samples were taken by the treating facility or prior to the time samples were taken in compliance with this part.

(d) Any individual who is required to be tested under Part 4 of this chapter or 33 CFR Part 95, is deemed to have consented to removal of body fluid and/or tissue samples necessary for toxicological analysis from the remains of the individual, if the individual dies within 12 hours as a result of a marine casualty.

(e) Nothing in this part shall be construed to authorize the use of physical coercion or any other deprivation of liberty in order to compel chemical testing.

Subpart B—Required Chemical Testing

§ 16.201 Application.

The regulations in this Subpart apply to:

(a) All individuals applying for, or acting under the authority of, a license, a certificate of registry, or a merchant mariners document issued under this subchapter;

(b) All other individuals employed or applying for employment aboard any vessel owned in the United States that is required by law or regulation to engage or be operated by an individual holding a license, certificate of registry, or merchant mariners document; and,

(c) All employers (1) owning or operating vessels owned in the United States that are required by law or regulation to engage or be operated by an individual holding a license, certificate of registry, or merchant mariners document, or (2) owning or operating vessels inspected, or subject to inspection, under 46 U.S.C. 3301.

§ 16.205 Events requiring chemical testing.

(a) Whenever a physical examination is required for an individual by this subchapter, a urinalysis must be included as a part of the physical examination. If a physical examination is required for a license or merchant mariners document application, the applicant shall provide the results of the urinalysis administered as part of the physical examination to the Regional Examination Center. For those individuals required to receive physical examinations on a more frequent basis, the individual shall present to the Regional Examination Center the results of all required urinalyses for the past five years when applying for license renewal.

(b) The prospective employer of an individual applying for employment aboard any vessel owned in the United States that is required by law or regulation to engage or be operated by an individual holding a license, certificate of registry, or merchant mariners document, shall at the time of application require the applicant to undergo a urinalysis.

(c) An individual to whom this subpart applies shall submit to a chemical test when directed to do so under Title 33 CFR Part 95, or when directed to do so under Part 4 of this chapter.

(d) An individual who has been subject to a random sampling program under § 16 210 of this part, and who has been tested under that program is not subject to the provision of paragraphs (a) and (b) of this section provided:

(1) The urinalysis required by paragraph (a) of this section is not part of a physical examination for issuance of an original license or merchant mariners document; and,

(2) The applicant provides satisfactory evidence certifying that he or she has been continuously subject to a random sampling program meeting the criteria of § 16.210 of this part for not less than six months, has not tested positive for unacceptable dangerous drug levels, has not refused to participate in required chemical tests, and has been tested within the past six months.

(e) Each employer shall test each employee to whom this subpart applies when there is reasonable suspicion that the employee has used dangerous drug(s) or alcohol in violation of this part and 33 CFR Part 95. At least two of the employee's supervisors shall substantiate and concur in the decision to test an employee who is reasonably suspected of drug or alcohol use. At least one of these supervisors shall be trained in detecting symptoms of drug and alcohol use. The decision to test must be based on a reasonable and articularable belief that the employee is using a dangerous drug or alcohol on the basis of physical indications of probable use (e.g., the employee's manner of speech or physical appearance).

§ 16.210 Required random sampling programs.

(a) Employers of personnel to which this subpart applies shall provide for the chemical testing of their personnel on a random basis for dangerous drugs.

(b) Random basis means that every member of a given population has an equal chance of selection on a scientifically valid basis. Random selection is to be accomplished through the use of a random-number table or computer based, random-number generator.

(c) The employer annually shall test on a random basis (a percentage of covered employees to be determined up to 125 percent).

(d) All crewmembers on the following vessels must be subject to testing on a random basis:

(1) Inspected vessels and vessels subject to inspection under 46 U.S.C. 3301;

(2) Uninspected vessels which are required by law or regulation to engage or be operated by an individual holding a license, certificate of registry, or merchant mariners document.

(e) An individual may not be engaged or employed, including self employment, on a vessel in a position for which a license, certificate of registry, or merchant mariners document is required by law or regulation unless all crewmembers are subject to a random sampling program.

(f) The employer shall report the results of positive chemical tests to the cognizant Coast Guard Officer in Charge, Marine Inspection.

(g) Employers of personnel to which this Section applies shall maintain records of the results of their random sampling program sufficient to satisfy the requirements of § 16.205(d). These records shall be maintained for a period of at least 5 years and shall be made available, upon request, to persons tested and Coast Guard officials.

Subpart C—Standards

§ 16.301 HHS guidelines.

Drug testing programs subject to this regulation shall be operated consistent with the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" published by the Department of Health and Human Services (53 FR 11970, April 11, 1988). Terms and concepts referenced in this part shall have the same meaning as in those guidelines. Where the guidelines refer to "Federal agencies" or "the agency," this shall mean "the employer" for the purpose of this regulation. This part contains requirements for drug testing programs in addition to those in the HHS guidelines. Drug testing programs governed by the regulation shall use only drug testing laboratories certified by the Department of Health and Human Services under the guidelines. These guidelines are available for inspection and copying at U.S. Coast Guard Headquarters, Marine Safety Council (G–LRA–2/21), Room 2110, 2100 Second Street SW., Washington, DC 20593–0001.

§ 16.305 General.

(a) If a chemical test required under § 16.205 of this part determines the existence of unacceptable dangerous drug levels as listed in the HHS Guidelines, the individual will be presumed to be a user of dangerous drugs and any license, certificate of registry, or merchant mariners document application will be denied.

(b) If a chemical test required under this part, Part 4 of this chapter, or 33 CFR Part 95 determines the existence of unacceptable dangerous drug levels as listed in the HHS Guidelines, the individual will be presumed to be a user of dangerous drugs. Subject to the rehabilitation options of § 16.310 of this part, an individual who currently holds a license, certificate of registry, or merchant mariners document, will be subject to suspension and revocation of his or her license, certificate, or document under Part 5 of this chapter. An individual who does not hold a license, certificate of registry, or merchant mariners document shall, subject to the rehabilitation options of § 16.310 of this part, be removed from the vessel or denied employment.

(c) If a chemical test required under this part, Part 4 of this chapter, or 33 CFR Part 95 determines the existence of unacceptable dangerous drug levels as listed in the HHS Guidelines, the individual will be presumed to be a user of dangerous drugs and may not serve on a vessel subject to this part, until:

(1) That individual is rehabilitated, if the individual is not a holder of a license, certificate of registry, or merchant mariners document; or

(2) That individual is reissued his or her license, certificate of registry, or merchant mariners document, if the individual is a holder of a license, certificate of registry, or merchant mariners document.

(d) Regardless of the rehabilitation options specified in § 16.310 of this part, if a chemical test required under this part, Part 4 of this chapter, or 33 CFR Part 95 determines the existence of

unacceptable dangerous drug levels as listed in the HHS Guidelines, and this is the individuals second confirmed positive test, the individual will be presumed to be a user of dangerous drugs. An individual who currently holds a license, certificate or registry, or merchant mariners document, shall be subject to suspension and revocation of his or her license, certificate, or document under Part 5 of this chapter. An individual who does not hold a license, certificate of registry, or merchant mariners document shall be removed from the vessel or denied employment.

§ 16.310 Employee Assistance Program (EAP).

The employer shall provide an EAP for all employees. The employer may establish the EAP as a part of its internal personnel services or the employer may contract with an entity that will provide EAP services to an employee. Each EAP must include education and training on drug use for employees and the employer's supervisory personnel and an opportunity for rehabilitation, as provided below:

(a) EAP rehabilitation program (Option 1).

(1) Each employer shall provide one rehabilitation opportunity for the following employees:

(i) Each employee who voluntarily enrolls in an EPA;

(ii) Each employee who is identified as a dangerous drug user through random, periodic, reasonable cause, or post casualty testing.

(2) Each employer shall retain or rehire an employee who:

(i) Has successfully completed his or her first rehabilitation program after voluntary enrollment or notification to the employee that he or she has failed a drug test;

(ii) Has not failed a drug test required by the employer's drug monitoring plan for employees who undergo rehabilitation; and

(iii) Has received a recommendation for return to duty as a result of that rehabilitation program.

(3) Employees who are identified as having used dangerous drugs on the job are not required to be afforded an opportunity for rehabilitation or to be retained or rehired.

(b) EAP rehabilitation program (Option 2).

(1) Each employer shall provide one rehabilitation opportunity for the following employees:

(i) Each employee who voluntarily enrolls in an EAP;

(ii) Each employee who is identified as a dangerous drug user through random or periodic testing.

(2) Each employer shall retain or rehire an employee who:

(i) Has successfully completed his or her first rehabilitation program after voluntary enrollment or notification to the employee that he or she has failed a random or periodic drug test;

(ii) Has not failed a drug test required by the employer's drug monitoring plan for employees who undergo rehabilitation; and

(iii) Has received a recommendation for return to duty as a result of that rehabilitation program.

(3) Employees who are identified as having specifically used drugs on the job or through reasonable cause or post casualty testing required by this part are not required to be afforded an opportunity for rehabilitation or to be retained or rehired.

(c) EAP rehabilitation program (Option 3).

(1) Each employer shall provide one rehabilitation opportunity for each employee who voluntarily enrolls in an EAP.

(2) Each employer shall retain or rehire an employee who:

(i) Has successfully completed his or her first rehabilitation program after voluntary enrollment; and

(ii) Has received a recommendation for return to duty as a result of that rehabilitation program.

(3) Employees who are identified as having used dangerous drugs on the job or through testing required by this part are not required to be afforded an opportunity for rehabilitation or to be retained or rehired.

(d) EAP rehabilitation program (Option 4).

(1) Each employer can decide its policy concerning whether rehabilitation will be offered.

(2) Individuals who are offered an opportunity for rehabilitation provided voluntarily by the employer, and who wish to be retained or rehired to their previous or similar position, should:

(i) Successfully complete his or her first rehabilitation program; and

(ii) Receive a recommendation for return to duty as a result of that rehabilitation program.

(e) EAP education program: Each EAP education program must include at least the following elements: Display and distribution of informational material; display and distribution of a community service hot-line telephone number for employee assistance; and display and distribution of the employer's policy regarding drug and alcohol use in the workplace.

(f) EAP training program: Each EAP training program must be conducted annually employer's supervisory personnel. The training program must include at least the following elements: The effects and consequences of drug and alcohol use on personal health, safety, and work environment; the manifestations and behavioral cues that may indicate drug and alcohol use and abuse; and documentation of training given to employees and employer's supervisory personnel. EAP training programs for employees and supervisory personnel must consist of at least 60 minutes for each employee and supervisor.

Date: June 30, 1988.

P.A. Yost,

Admiral, U.S. Coast Guard, Commandant.

[FR Doc. 88–15137 Filed 7–7–88; 8:45 am]

BILLING CODE 4910-14-M

TESTIMONY OF B. WAYNE VANCE
GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION
BEFORE THE SUBCOMMITTEE ON MERCHANT MARINE
COMMITTEE ON MERCHANT MARINE AND FISHERIES
1334 LONGWORTH HOUSE OFFICE BUILDING

9:30 A.M.

SEPTEMBER 22, 1988

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

ON BEHALF OF SECRETARY BURNLEY, I AM PLEASED TO BE HERE TODAY TO DISCUSS THE COAST GUARD'S NOTICE OF PROPOSED RULEMAKING ON THE DRUG TESTING OF MERCHANT MARINERS. ACCOMPANYING ME ARE CAPTAIN FREDERIC GRADY, CHIEF, MERCHANT VESSEL PERSONNEL DIVISION OF THE COAST GUARD, AND ROBERT SILBERMAN, DEPUTY ADMINISTRATOR OF THE MARITIME ADMINISTRATION.

MR. CHAIRMAN, I THINK WE CAN ALL AGREE THAT THIS NATION SIMPLY CANNOT ACCEPT A TRANSPORTATION SYSTEM WHERE THE SAFETY OF PASSENGERS, WORKERS, AND THE GENERAL PUBLIC IS AT RISK DUE TO DRUG USE BY TRANSPORTATION WORKERS. THIS NPRM IS PART OF THE DEPARTMENT OF TRANSPORTATION'S COMPREHENSIVE PROGRAM TO ELIMINATE SUBSTANCE ABUSE IN THE TRANSPORTATION INDUSTRY. I DOUBT ANY REASONABLE PERSON DISAGREES WITH THIS GOAL.

THE NPRM WAS PUBLISHED ON JULY 8, 1988 AND THE PUBLIC COMMENT PERIOD ENDED SEPTEMBER 6, 1988. A SIXTY-DAY COMMENT PERIOD WAS PROVIDED FOR THIS RULE BECAUSE WE NEEDED TO MOVE QUICKLY TO PROVIDE FOR DRUG TESTING PROGRAMS IN THE MARITIME INDUSTRY. HOWEVER, EVEN BEFORE THE NPRM WAS ISSUED, THESE SAME ISSUES HAD BEEN THE SUBJECT OF MEDIA ATTENTION AND WERE, INDEED, RAISED SPECIFICALLY IN FIVE OTHER DOT-MODAL ADMINISTRATION NPRM'S THAT WERE MADE PUBLIC RECENTLY. IN ADDITION, NOTICE OF THESE ISSUES WAS PROVIDED IN THE DEPARTMENT'S REGULATORY PROGRAM AND SEMIANNUAL AGENDAS. A NUMBER OF PEOPLE HAVE ASKED FOR ADDITIONAL TIME TO RESPOND. ALTHOUGH WE DECLINED TO EXTEND THE COMMENT PERIOD FOR THE REASONS I JUST MENTIONED, WE WILL TRY TO ADDRESS ALL COMMENTS WHICH ARE FILED LATE, TO THE EXTENT IT WILL NOT DELAY THE

RULEMAKING. THE COAST GUARD IS NOW REVIEWING THE COMMENTS RECEIVED. AT THIS POINT IN THE PROCESS, IT WOULD BE INAPPROPRIATE AND PREMATURE TO DISCUSS WHAT DECISIONS WILL BE MADE CONCERNING THE FINAL RULE.

WE ALL RECOGNIZE THAT DRUG USE IS A SERIOUS NATIONAL PROBLEM. THE DEPARTMENT OF TRANSPORTATION IS SEEKING TO COMBAT DRUG USE AND ENSURE THAT THE TRANSPORTATION SYSTEM IS AS SAFE AS POSSIBLE. THIS DEPARTMENT'S EFFORTS TOWARD A DRUG-FREE TRANSPORTATION SYSTEM HAVE MADE US ONE OF THE LEAD AGENCIES IN FIGHTING THE WAR ON DRUGS. WE HAVE PROPOSED DRUG TESTING RULES FOR KEY PERSONNEL IN THE AVIATION, RAIL, MASS TRANSIT, COMMERCIAL MOTOR CARRIER, PIPELINE AND MARITIME INDUSTRIES. EXCEPT FOR RAIL, WHICH ALREADY HAS AN ANTI-DRUG REGULATION REQUIRING EVERYTHING EXCEPT RANDOM TESTING, THE RULES WOULD REQUIRE PRE-EMPLOYMENT, PERIODIC, RANDOM, REASONABLE CAUSE, AND POST-ACCIDENT DRUG TESTING FOR EMPLOYEES IN DEFINED SENSITIVE SAFETY AND SECURITY-RELATED POSITIONS AND WOULD ADD RANDOM TESTING FOR RAIL EMPLOYEES. ALL TESTING WOULD TAKE PLACE UNDER STRICT FEDERAL GUIDELINES AND WITH RESPECT FOR THE PRIVACY AND DIGNITY OF THE INDIVIDUAL. WE WILL MAKE EVERY EFFORT TO GIVE EMPLOYERS THE FLEXIBILITY THEY NEED IN DESIGNING COMPANY-SPECIFIC PROGRAMS.

THE DEPARTMENT IS ALSO CONCERNED ABOUT ALCOHOL ABUSE; HOWEVER, THAT IS MORE EASILY DETECTABLE AND REQUIRES VERY DIFFERENT TYPES OF TESTING. LAST DECEMBER, THE COAST GUARD ISSUED A RULE THAT ESTABLISHED A FEDERAL BLOOD ALCOHOL CONCENTRATION STANDARD AND REQUIRED MARINE EMPLOYERS TO DETERMINE WHETHER THERE IS ANY EVIDENCE OF ALCOHOL OR DRUG USE BY INDIVIDUALS DIRECTLY INVOLVED IN A MARINE CASUALTY. THE FAA, FRA AND FHWA ALSO HAVE RULES DIRECTED AGAINST ALCOHOL USE. THE NPRM REQUIRING POST-CASUALTY TESTING FOR ALCOHOL OR DRUGS PROPOSED TO AMEND COAST GUARD'S CURRENT RULE ON OPERATING A VESSEL WHILE INTOXICATED TO MAKE ALCOHOL TESTING MANDATORY FOR MARINE EMPLOYEES RATHER THAN DISCRETIONARY IN POST ACCIDENT AND REASONABLE CAUSE TESTING SITUATIONS.

THE DEPARTMENT IS CONCERNED ABOUT DRUG USE IN THE TRANSPORTATION INDUSTRY FOR THE FOLLOWING REASONS. FIRST, THE NATURE OF THE INDUSTRY IS SUCH THAT IT INVOLVES PEOPLE IN POSITIONS WHERE THEY CAN CAUSE SERIOUS HARM TO OTHERS THROUGH THEIR ACTIONS. OUR RELIANCE ON THE PERFORMANCE OF MILLIONS OF VEHICLE AND VESSEL OPERATORS PRESENTS IMMENSE POTENTIAL FOR UNSAFE PRACTICES. TRANSPORTATION PROFESSIONALS ARE RESPONSIBLE FOR LARGE NUMBERS OF PASSENGERS AND VALUABLE, AS WELL AS DANGEROUS, CARGOES, OFTEN OPERATING HIGHLY COMPLEX MACHINES TRAVELING AT HIGH SPEEDS. CONSEQUENTLY, THERE IS LITTLE MARGIN FOR ERROR IN TRANSPORTATION OPERATIONS. UNLIKE ALCOHOL, WE KNOW LITTLE ABOUT THE PRECISE RELATIONSHIP BETWEEN THE AMOUNT OR TIMING OF DRUGS INGESTED AND LEVELS OF IMPAIRMENT. HOWEVER, WE DO KNOW THAT DRUGS DULL THE ABILITY TO THINK AND REACT QUICKLY, BOTH FROM DIRECT AND HANG-OVER EFFECTS. EVEN OFF-DUTY USE CAN AFFECT JOB PERFORMANCE. STUDIES HAVE SHOWN THAT DRUG USERS FUNCTION AT ONLY ABOUT TWO-THIRDS OF THEIR WORK POTENTIAL. AND, MOST DISTURBING, DRUG USERS ARE THREE-TO-FOUR TIMES MORE LIKELY TO BE INVOLVED IN ON-THE-JOB ACCIDENTS THAN NON-USERS. SECOND, WHILE DETAILED INFORMATION IS LACKING, THERE IS SOME EVIDENCE OF ILLEGAL DRUG USE BY PEOPLE IN SENSITIVE SAFETY POSITIONS IN THE TRANSPORTATION INDUSTRY.

THERE IS NO EVIDENCE THAT USAGE BY THESE PEOPLE IN THE MARITIME INDUSTRY OR ANY OF THE OTHERS WE REGULATE IS ANY LESS THAN IT IS FOR THE GENERAL POPULATION WHERE USAGE IS SIGNIFICANT. AT LEAST 23 MILLION AMERICANS CURRENTLY USE COCAINE, MARIJUANA, OR OTHER ILLEGAL NARCOTICS. ALTHOUGH ACTUAL USAGE LEVELS IN THE TRANSPORTATION INDUSTRY MAY BE UNKNOWN, WE BELIEVE THAT ANY USAGE BY ANYONE IN A SENSITIVE SAFETY POSITION IS COMPLETELY UNACCEPTABLE.

WE HAVE ALL SEEN, TIME AND AGAIN, THAT DRUGS MIXED WITH ANY FORM OF TRANSPORTATION ARE A DEADLY COMBINATION. THE GRIM STATISTICS FROM ONE INDUSTRY WHICH NOW HAS MANDATORY, POST-ACCIDENT TESTING, AMONG OTHERS, THE RAIL INDUSTRY, ATTEST TO THIS. THE JANUARY 1987 CONRAIL-AMTRAK CRASH IN CHASE, MARYLAND, WHERE A CONRAIL ENGINEER

WITH DRUGS IN HIS SYSTEM ROLLED THROUGH SEVERAL WARNING SIGNALS AND COLLIDED WITH AN AMTRAK PASSENGER TRAIN, WAS A NEEDLESS TRAGEDY. SIXTEEN PEOPLE DIED IN THAT CRASH AND 178 WERE INJURED. THE NATIONAL TRANSPORTATION SAFETY BOARD, IN ITS ACCIDENT INVESTIGATION REPORT, DETERMINED THAT "THE PROBABLE CAUSE OF THE ACCIDENT WAS THE FAILURE, AS A RESULT OF IMPAIRMENT BY MARIJUANA, OF THE ENGINEER...[TO STOP AT THE SIGNAL]." ALTHOUGH THE LINK BETWEEN DRUG USE AND ACCIDENT CAUSATION HAS NOT BEEN POSITIVELY DETERMINED IN ALL CASES, SINCE JANUARY OF 1987, THERE HAVE BEEN FIFTY MAJOR RAIL ACCIDENTS IN WHICH ONE OR MORE KEY EMPLOYEES TESTED POSITIVE FOR ILLEGAL DRUG USE. THOSE CRASHES CAUSED 31 FATALITIES, 353 INJURIES, AND MORE THAN $35 MILLION IN PROPERTY DAMAGE. LAST YEAR, 65 PERCENT OF ALL TRAIN-ACCIDENT FATALITIES OCCURRED IN ACCIDENTS WHERE AT LEAST ONE EMPLOYEE INVOLVED TESTED POSITIVE FOR DRUG USE.

RAILROAD EMPLOYEES ARE NOT THE ONLY TRANSPORTATION WORKERS WHO ARE SUSCEPTIBLE TO DRUG USE AND THE DANGERS THAT COME WITH IT. IN JANUARY, NINE PEOPLE DIED IN A COMMUTER AIRCRAFT CRASH IN DURANGO, COLORADO. THE PILOT OF THE AIRCRAFT HAD COCAINE IN HIS BLOOD. WHEN THE *PITTSBURGH PRESS* INTERVIEWED EMERGENCY ROOM STAFFS AT AREA HOSPITALS, 23 CASES OF AIRLINE FLIGHT-CREW DRUG ABUSE WERE INSTANTLY RECALLED. A DOZEN COCKPIT CREW MEMBERS AND ELEVEN FLIGHT ATTENDANTS WERE AMONG THOSE TREATED AT HOSPITALS FOR DRUG ABUSE, ACCORDING TO THE REPORT. THESE ARE PEOPLE RESPONSIBLE FOR THE LIVES OF HUNDREDS OF PASSENGERS EACH DAY.

DRUG USE IS JUST AS MUCH A SOCIAL ILL FOR THE TRANSPORTATION INDUSTRY AS FOR SOCIETY-AT-LARGE, BUT THE CONSEQUENCES CAN BE EXPONENTIALLY WORSE......INDEED, CATASTROPHIC. WE CANNOT WAIT FOR AN ACCIDENT TO HAPPEN BEFORE WE REQUIRE DRUG TESTING. THE ABSENCE OF DATA ON ACCIDENTS DOES NOT INDICATE THERE IS NO PROBLEM. THE DURANGO AIRCRAFT ACCIDENT OCCURRED AFTER WE HAD COMPLETED DRAFTING OUR DRUG TESTING NPRM FOR COMMERCIAL AVIATION. WE WOULD LIKE TO PREVENT A SIMILAR CATASTROPHIC ACCIDENT IN THE MARINE AREA.

HISTORICALLY, COAST GUARD DATA HAS NOT SPECIFICALLY IDENTIFIED THE USE OF DRUGS OR ALCOHOL AS A MAJOR CAUSE OF COMMERCIAL VESSEL LOSSES OR CASUALTY DAMAGE. HOWEVER, THE USE OF ALCOHOL AND DRUGS HAS HAD A SUBSTANTIAL IMPACT ON MARINE SAFETY. COAST GUARD MARINE CASUALTY RECORDS SPANNING THE YEARS 1981 TO 1986 REVEAL 75 DEATHS, 52 INJURIES, AND $6.5 MILLION IN PROPERTY DAMAGE RESULTING FROM REPORTABLE COMMERCIAL VESSEL CASUALTIES INVOLVING THE OBVIOUS USE OF INTOXICANTS. THESE FIGURES ARE NOT BROKEN DOWN BETWEEN DRUGS AND ALCOHOL. IN ADDITION, DURING THE SAME PERIOD, THE COAST GUARD TOOK SUSPENSION AND REVOCATION ACTION AGAINST 89 SEAMEN FOR ALCOHOL-RELATED OFFENSES AND 134 SEAMEN FOR DRUG-RELATED OFFENSES. HOWEVER, FATAL ACCIDENTS AND SUSPENSION AND REVOCATION PROCEEDINGS CANNOT BE THE ONLY BASES ON WHICH TO JUDGE WHETHER THERE IS A PROBLEM WITH SUBSTANCE ABUSE. THERE IS NO WAY TO GAUGE HOW MANY MINOR OR NEAR ACCIDENTS THERE HAVE BEEN DUE TO INTOXICATION. I DO NOT QUESTION THE PROFESSIONALISM OF THE VAST MAJORITY OF MERCHANT MARINERS AND OUR PROPOSED RULE IS NOT INTENDED TO IMPUGN THEIR PROFESSIONALISM.

HOWEVER, WE ALL REALIZE THAT THERE IS A DRUG PROBLEM IN SOCIETY, AND NO PORTION OF SOCIETY APPEARS TO BE IMMUNE FROM IT. DRUG OR ALCOHOL USE BY MARITIME PERSONNEL POSES DANGERS TO THEMSELVES AND SHIPMATES AND PLACES THEM IN A POSITION TO CAUSE, OR CONTRIBUTE TO, VESSEL CASUALTIES THAT MAY TAKE HUMAN LIFE, DESTROY PROPERTY, OR SERIOUSLY HARM THE ENVIRONMENT. THE PROBLEM IN THE MARINE INDUSTRY IS EXACERBATED BY THE FACT THAT MARINERS OFTEN LIVE ON BOARD THEIR VESSELS FOR LONG PERIODS OF TIME. IN ADDITION TO REGULARLY ASSIGNED DUTIES, EACH INDIVIDUAL ENGAGED ON BOARD A VESSEL HAS RESPONSIBILITIES IN EMERGENCY SITUATIONS, EVEN WHEN OTHERWISE CONSIDERED OFF DUTY. IMPAIRED PERSONNEL CANNOT SERVE THEIR VESSEL IN AN EMERGENCY, AND POSE A HAZARD IF THEY ATTEMPT TO PERFORM ANY NECESSARY SAFETY-RELATED FUNCTIONS.

TO PROVIDE THE GREATEST POSSIBLE ASSURANCE THAT THE COMMERCIAL FLEET HAS A SAFE, DRUG-FREE, WORK ENVIRONMENT FOR ALL PERSONNEL, THE COAST GUARD IS PROPOSING THAT AN INDIVIDUAL MAY NOT BE EMPLOYED, INCLUDING SELF EMPLOYMENT, ON ANY VESSEL IN A POSITION

FOR WHICH A LICENSE, CERTIFICATE OF REGISTRY, OR MERCHANT MARINERS DOCUMENT IS REQUIRED, UNLESS THE ENTIRE CREW IS COVERED BY THE PROPOSED DRUG PROGRAM.

WE RECOGNIZE AND ARE ENCOURAGED THAT SOME MARITIME COMPANIES ALREADY HAVE DRUG TESTING PROGRAMS IN PLACE THAT ARE WORKING WELL. OUR RULES WOULD ADD FEATURES TO MAKE THE PROGRAMS BETTER AND MORE COMPLETE, SUCH AS CONFIRMATION TESTING OR RANDOM TESTING.

WE RECOGNIZE THAT THE IMPLEMENTATION OF A DRUG TESTING RULE WILL NOT BE EASY, GIVEN THE NATURE OF THE MARITIME INDUSTRY. THERE ARE INHERENT DIFFICULTIES IN ESTABLISHING A PROGRAM FOR PRE-EMPLOYMENT TESTING IN AN INDUSTRY WHERE CREW MEMBERS ARE EMPLOYED ONLY BY THE VOYAGE AND ARE HIRED ON SHORT NOTICE, OFTEN THE DAY THE VESSEL SAILS. THE NPRM RECOGNIZED THESE ISSUES AND SOUGHT COMMENTS ON THEM.

REGARDLESS OF THE IMPLEMENTATION PROBLEMS, FOR THE SAKE OF PUBLIC SAFETY, DRUG USERS IN OUR TRANSPORTATION SYSTEM MUST BE IDENTIFIED AND REMOVED FROM SENSITIVE SAFETY POSITIONS. WE ARE GOING AFTER ILLEGAL USE, INCLUDING OFF-DUTY USE. THE ONLY PROVEN MEANS TO IDENTIFY ILLEGAL USERS IS DRUG TESTING, AND RANDOM TESTING IS THE MOST EFFECTIVE METHOD OF ALL.

WE KNOW RANDOM TESTING WORKS. THE COAST GUARD HAS HAD A MANDATORY RANDOM DRUG TESTING POLICY IN PLACE FOR ITS MILITARY PERSONNEL SINCE 1983. THE PROGRAM'S SUCCESS IN REDUCING DRUG USAGE IS NOTHING SHORT OF REMARKABLE. THE PERCENTAGE OF THOSE MILITARY PERSONNEL TESTING POSITIVE HAS DROPPED FROM 10.3 PERCENT WHEN THE PROGRAM BEGAN TO LESS THAN THREE PERCENT LAST YEAR. THE COAST GUARD'S EXPERIENCE HAS SHOWN THE DETERRENT VALUE OF RANDOM TESTING. IN ADDITION, THE DEPARTMENT'S RANDOM DRUG TESTING PROGRAM FOR ITS OWN EMPLOYEES OCCUPYING SENSITIVE SAFETY AND SECURITY-RELATED POSITIONS HAS BEEN SUCCESSFUL IN DETECTING ILLEGAL DRUG USE. SINCE THE PROGRAM HAS BEEN IN EFFECT FOR ONLY ONE YEAR, IT IS NOT YET POSSIBLE TO DRAW MEANINGFUL CONCLUSIONS

ABOUT ITS DETERRENT EFFECT. NONETHELESS, AS OF SEPTEMBER 9, 1988, THE DEPARTMENT HAS ANALYZED 4,280 SAMPLES, RESULTING IN 39 POSITIVE REPORTS FOR ILLEGAL DRUG USE.

AMONG SAFETY SENSITIVE AND SECURITY-RELATED TRANSPORTATION EMPLOYEES, THERE IS NO SUCH THING AS A MINOR DRUG PROBLEM. ANY DRUG USE CAN HAVE DISASTROUS CONSEQUENCES. AS THIS COUNTRY'S DRUG-RELATED DEATH TOLL MOUNTS, THE AMERICAN PEOPLE ARE INCREASINGLY CALLING FOR A "GET TOUGHER THAN TOUGH" ATTITUDE TOWARD THOSE WHO USE AND SELL DRUGS. THERE WILL BE COSTS TO IMPLEMENTING THESE PROGRAMS BUT WE ALL SHARE THE BURDEN OF SOLVING THIS TERRIBLE PROBLEM.

THIS COMPLETES MY PREPARED STATEMENT. I WOULD BE PLEASED ALONG WITH CAPTAIN GRADY AND DEPUTY ADMINISTRATOR SILBERMAN TO RESPOND TO QUESTIONS FROM COMMITTEE MEMBERS.

QUESTIONS SUBMITTED BY THE HONORABLE WALTER B. JONES, CHAIRMAN, SUBCOMMITTEE ON MERCHANT MARINE TO THE DEPARTMENT OF TRANSPORTATION; ALONG WITH ANSWERS FURNISHED BY THE COAST GUARD DATED DECEMBER 29, 1988

1. QUESTION. UNDER THE MANDATE OF THE COAST GUARD AUTHORIZATION ACT OF 1984, YOU IMPLEMENTED A FINAL RULE ON DECEMBER 14, 1987 THAT WAS "DESIGNED TO MONITOR, CONTROL, AND REDUCE ALCOHOL AND DRUG USE IN BOTH RECREATIONAL VESSEL OPERATION AND COMMERCIAL MARINE OPERATIONS." THE ADVANCED NOTICE OF PROPOSED RULEMAKING (NPRM) ON THAT WAS PUBLISHED IN THE FEDERAL REGISTER ON MAY 23, 1986. WHAT WAS THE PURPOSE OF THAT RULE?

Answer. The purpose of the rule was as stated: to monitor, control, and reduce alcohol and drug use in both recreational vessel and commercial marine operations.

2. QUESTION. CONSIDERING THE SAFETY ISSUES THAT RULE SOUGHT TO ADDRESS, WHY DID IT TAKE SO LONG TO FINALIZE?

Answer. We had to consider several safety issues before finalizing the rule. We considered technical and scientific material relative to an appropriate blood alcohol content (BAC) level for commercial operations, below the commonly accepted .10 BAC for drivers. The feasibility of testing and enforcing at the level selected was also examined. We also had to coordinate the recreational boater standard with state standards, especially in view of the fact that most of the enforcement would be conducted by state officials.

3. QUESTION. ON SEPTEMBER 22, 1988, WE HEARD TESTIMONY THAT MANY COMPANIES HAVE DRUG AND ALCOHOL PROGRAMS THAT THEY HAVE DEVELOPED WHICH FIT THEIR PARTICULAR SITUATIONS. IN YOUR INVESTIGATIONS PRIOR TO ISSUING THE NOTICE OF PROPOSED RULEMAKING, DID YOU FIND THESE PROGRAMS TO BE UNSATISFACTORY?

Answer. The Coast Guard was very impressed with the many existing drug and alcohol programs in the maritime industry. However, they varied greatly in their coverage of personnel and in program implementation. Our regulations establish uniform requirements which meet minimum acceptable criteria. Any existing drug and alcohol program that meets the minimum requirements of the Coast Guard Final Rule will be satisfactory.

4. QUESTION. YOU POSE SEVERAL DOZEN QUESTIONS IN YOUR NPRM. WERE ALL THESE QUESTIONS ANSWERED BY INDUSTRY TO YOUR SATISFACTION?

Answer. Comments from industry, individual members of the maritime community, and the general public provided a satisfactory basis for developing the Coast Guard Final Rule.

5. QUESTION. YOU CITE SEVERAL STATUTES AS AUTHORITY FOR ISSUING THIS RULE, WHICH WOULD COVER, AMONG OTHERS, PERSONNEL NOT REQUIRED TO HAVE MERCHANT MARINERS' DOCUMENTS, SUCH AS UNLICENSED CREWMEMBERS ON FISHING VESSELS AND SUBCHAPTER T EXCURSION BOATS. IN FACT, MANY OF THESE VESSELS ARE NOT REQUIRED TO BE INSPECTED. DOES THE COAST GUARD HAVE JURISDICTION TO IMPLEMENT THIS RULE WITH RESPECT TO THESE INDIVIDUALS?

Answer. Yes, as explained in detail in the preamble to the final rule, we believe the courts will sustain the rule.

6. QUESTION. IT HAS BEEN STATED THAT SOME COMPANIES COULD FAIL AS A RESULT OF THE COST OF THIS PROPOSAL. ARE YOU CONCERNED ABOUT YOUR RULEMAKING'S EFFECT ON INNOCENT BUSINESSMEN?

Answer. There are a number of alternatives available to minimize the costs of implementing the Final Rule. These alternatives are discussed in the preamble to the rule. We do not expect that any business will fail because of the rule.

7. QUESTION. A NUMBER OF WITNESSES AT THE HEARING EXPRESSED SERIOUS DOUBTS ABOUT THE CONSTITUTIONALITY OF THE PROPOSED RULE. DO YOU FEEL THAT THE RULE WILL BE ABLE TO WITHSTAND JUDICIAL EXAMINATION; AND, IN YOUR OPINION, WHAT PART OF THE RULE IS MOST VULNERABLE TO BEING RULED UNCONSTITUTIONAL?

Answer. The preamble to the Final Rule discusses constitutional issues raised by the Rule. While not totally free from doubt, it is the opinion of the Department of Transportation that the Coast Guard's anti-drug program will be determined to be constitutional.

8. QUESTION. YOUR PROPOSED RULE STATES THAT THE PURPOSE OF THE REGULATION IS TO "PROVIDE A MEANS TO MINIMIZE THE USE OF DANGEROUS DRUGS BY MERCHANT MARINE PERSONNEL AND TO PROMOTE A DRUG FREE AND SAFE WORK ENVIRONMENT." FURTHER, IT IS ACKNOWLEDGED THAT THE RULE WOULD NOT EXTEND TO FOREIGN VESSELS, WHICH MAKE UP THE VAST MAJORITY OF SHIPS IN THE U.S. PASSENGER AND FOREIGN CARGO TRADES. IN ORDER TO FULLY ACCOMPLISH YOUR GOAL, WOULD YOU AGREE THAT THE RULE MUST BE EXTENDED TO THOSE VESSELS, AND WHAT WOULD BE THE BEST WAY TO DO THAT?

Answer. The Coast Guard does not have authority to regulate the working conditions on foreign vessels. Our only interest is the safe navigation of these vessels while in our waters. The Coast Guard was unable to devise a practical method of imposing the requirements of the Final Rule on these vessels during the short periods of time they may be navigating in our waters.

9. QUESTION. HOW DO YOU REACT TO THE SUGGESTION THAT THE REHABILITATION COST BE PAID OUT OF DEPARTMENT OF TRANSPORTATION OR OTHER FEDERAL FUNDS?

Answer. The Coast Guard Final Rule does not mandate rehabilitation treatment.

10. QUESTION. WOULD IT BE ADVISABLE TO DELAY THIS RULE UNTIL AFTER THE SUPREME COURT ADDRESSES THIS ISSUE?

Answer. There are a multitude of issues presented in the various pre-existing and newly promulgated drug rules and programs. The Final Rule published on November 21, 1988 contains issues not present in the cases now being reviewed by the Supreme Court. Therefore, waiting until the Court renders its decisions in the current cases is not appropriate.

11. QUESTION. THE UNITED SHIPOWNERS OF AMERICA RECOMMENDS A RULE ALLOWING SHIPPING COMPANIES TO REPORT POSITIVE DRUG TESTS TO THE COAST GUARD, AND A REQUIREMENT THAT THE COAST GUARD ACT AGAINST THE DRUG ABUSER. THIS IMPLIES THAT OPERATORS CANNOT GIVE THAT INFORMATION TO THE COAST GUARD NOW AND THAT IF THEY DO NOTHING HAPPENS. PLEASE COMMENT.

Answer. There has been no regulatory prohibition against employers forwarding drug use information to the Coast Guard, and the Coast Guard has taken appropriate action upon receipt of such information. The Final Rule requires all positive test results to be forwarded to the Coast Guard for appropriate action.

QUESTIONS SUBMITTED BY THE HONORABLE JIM SAXTON, MEMBER, SUBCOMMITTEE ON MERCHANT MARINE TO THE DEPARTMENT OF TRANSPORTATION; ALONG WITH ANSWERS FURNISHED BY THE COAST GUARD DATED DECEMBER 29, 1988

QUESTION. YOU INDICATED EARLIER THAT A VESSEL ON WHICH A SINGLE CREWMAN TESTS POSITIVE WOULD NOT BE SEIZED. HOW DO YOU JUSTIFY THIS UNDER THE ZERO TOLERANCE POLICY, AND HOW DOES THIS VARY FROM THE SEIZURE OF FISHING VESSELS?

Answer. The Zero Tolerance policy applies to the presence of drugs aboard a vessel. An individual may test positive for a dangerous drug used prior to boarding a vessel. Positive drug test results are an indication of past use, not present possession, of dangerous drugs.

U.S. Department of Transportation
United States Coast Guard

Commandant
United States Coast Guard

Washington, DC 20593
Staff Symbol: G-CC/104
Phone: 366-4280

NOV 16 1988

The Honorable Norman F. Lent
Ranking Minority Member
Subcommittee on Merchant Marine
Committee on Merchant Marine and Fisheries
United States House of Representatives
Washington, D. C. 20515-6230

Dear Mr. Lent:

In reference to your letter of 26 September 1988 to Mr. B. Wayne Vance, General Counsel, Department of Transportation, the attached Questions and Answers for the Record of the hearing on 22 September 1988, concerning drug testing of merchant marine personnel are provided. Questions 1a and 1c through 1g have been overtaken by the Secretary's signing of the Final Rule on 14 November and no additional information is provided with these responses. No response to Question 3 is provided as the Department is not authorized to comment on pending litigation. All responses have been reviewed and approved, as required, by the Department of Transportation, and the Office of Management and Budget.

Please do not hesitate to call if I can provide further assistance.

Sincerely,

R. T. Rufe
Captain, U. S. Coast Guard
Chief, Congressional Affairs Staff
By direction of the Commandant

Enclosures: (1) Qs and As for Congressman Norman F Lent,
1b, 2, 2a, 2b, 4, 4a, 4b, 4c, 5a, 5b
(2) Qs and As for Congressman Don Young, 1-5

Copy: Honorable Walter B. Jones
Chairman, Subcommittee on Merchant Marine

QUESTIONS EY THE HONORABLE NORMAN F. LENT, RANKING MINORITY MEMEER OF THE SUECOMMITTEE ON MERCHANT MARINE, TO THE UNITED STATES COAST GUARD; ALONG WITH REPLIES FROM THE COAST GUARD, DATED 16 NOV 1988

(1B) QUESTION. THE COMMENT PERIOD ON THESE PROPOSED REGULATIONS HAS CLOSED. YOU HAVE RECEIVED ALL THE COMMENTS. HAVE YOU REVIEWED INDUSTRY PROJECTIONS ON THE COST?

Answer. All comments, including industry comments on costs, have been reviewed and are being considered in development of the final rule. All comments received subsequent to the end of the comment period are also being considered.

(2) QUESTION. DOES THE COAST GUARD REALLY FEEL THAT DRUG USE IS A PROBLEM IN THE MERCHANT MARINE?

Answer. Yes. The Coast Guard believes that the merchant marine is not immune to the drug problems in the United States. Although limited, the data discussed in our Notice of Proposed Rulemaking (NPRM) indicates there is drug abuse in the merchant marine. The comments we have received also reflect a degree of drug use in the merchant marine, and indicate that aggressive drug testing programs could reduce the incidence of drug abuse.

(2A) QUESTION. FROM YOUR OWN FEDERAL REGISTER DOCUMENTS IT WOULD APPEAR THAT YOU ARE NOT SURE THERE IS A PROBLEM.

Answer. Despite a lack of specific data directly relating marine casualties to drug use, the Coast Guard believes that drug abuse is an ongoing problem in the merchant marine, as well as in society as a whole. The comments in the public docket for this rulemaking have provided data that supports this belief. Some companies that now have some form of drug testing program stated that they have experienced substantial reductions in the number of people testing positive since they implemented their programs.

(2B) QUESTION. SINCE THESE REGULATIONS APPARENTLY ONLY REQUIRE TESTING FOR ALCOHOL ABUSE IN "REASONABLE CAUSE" OR "POST ACCIDENT" SITUATIONS, ARE YOU SATISFIED THAT YOUR 1987 REGULATIONS CONCERNING INTOXICATION ADEQUATELY ADDRESS THE ISSUE OF ALCOHOL ABUSE?

Answer. The 1987 rules provide adequate controls on the use of alcohol in relation to performing duties aboard ship, however, the rules do not provide for mandatory testing of persons suspected of being intoxicated, or for determining whether alcohol was a factor in a marine casualty. The proposed rules will address this issue.

(3) With all the recent court actions concerning drug testing programs, are you confident that your regulations will withstand judicial scrutiny?

A. What distinguishes this program from, for example, the Department of Justice program that was enjoined by the Court?

B. What about the Court of Appeals ruling in the case of Railway Labor Executive's Association vs. James H. Burnley concerning unreasonable searches and seizures related to post-accident testing? How is that case different from these proposed rules?

NOTE: Reference the Coast Guard's letter of 16 November 1988.

(4) QUESTION. DOES THE COAST GUARD BELIEVE THAT SHIP CAPTAINS OR OTHER OFFICERS CAN PROPERLY ADMINISTER THE KINDS OF TESTS THAT ARE CALLED FOR?

Answer. The proposed rules would require shipboard personnel to collect urine samples and conduct breath-alcohol tests in some circumstances. The Office of the Secretary of the Department of Transportation will publish Procedures for Transportation Workplace Drug Testing Programs. These procedures, based on the Department of Health and Human Services (DHHS) guidelines, will provide specific instructions on how urine samples should be collected. Comments on our proposed rules objected to the cost and training requirements concerning breath alcohol testing. We are considering these comments in the development of our final rule. We will make every effort to limit the final rules to requirements that can be administered easily by shipboard personnel.

(4A) QUESTION. WHAT ABOUT ENSURING THAT SPECIMENS ARE PROPERLY HANDLED AND THE CHAIN OF CUSTODY IS PROTECTED?

Answer. The proposed rule would require that DHHS guidelines be followed in urine sample collection. Those guidelines provide a strict chain of custody, which, when followed, ensure the integrity of the collection and handling procedures. On October 18, 1988 the Department of Transportation decided to issue its own regulations for urine testing procedures. The Departmental procedures will be based on the DHHS guidelines and will provide for a strict chain of custody to ensure integrity of collection and handling procedures.

(4B) QUESTION. WITH THE FOUL-UP BY THE LABORATORY THAT DID THE TESTS ON THE CONRAIL ENGINEER LAST YEAR, IT SEEMS TO ME THAT THESE REGULATIONS HAVE TO BE VERY CAREFULLY DRAWN TO PROHIBIT A RECURRENCE OF THAT KIND OF PROBLEM. DO YOU AGREE? WHAT PROVISIONS HAVE BEEN INCLUDED THAT WILL PREVENT A RECURRENCE?

Answer. Yes, we agree completely. The Coast Guard has proposed that required sample analysis be conducted only at Department of Health and Human Services (DHHS) certified laboratories. The laboratory that did the tests you mentioned was not an HHS certified laboratory. The strict standards applied to certified laboratories should ensure the integrity and accuracy of test results.

(4C) QUESTION. WHAT IF A CREWMAN SUSPECTS THAT THE MASTER OF A VESSEL HAS A DRUG PROBLEM? WOULD A JUNIOR OFFICER TEST THE CAPTAIN? ARE YOU COMFORTABLE WITH THE IMPACT THAT SUCH A DEVELOPMENT WOULD HAVE ON THE "CHAIN OF COMMAND" OF A VESSEL?

Answer. The proposed rules require marine employers to provide for the testing of a master when he or she is directly involved in a serious marine incident. Additionally, if junior personnel suspect a master of abusing drugs, that information can be passed to the employer for appropriate action. The effect of reporting a master for drug abuse should be no different than the effect of reporting the master for any other serious health or performance problems.

(5A) QUESTION. ON SEPTEMBER 20, 1988, THE HOUSE OF REPRESENTATIVES PASSED H.R. 4748 -- THE RAILROAD DRUG ABUSE PREVENTION ACT. DOES YOUR AGENCY HAVE A POSITION ON THAT BILL?

Answer. The Department supports legislation to strengthen and improve the nation's anti-drug abuse laws and would have welcomed legislation affirming the Federal Railroad Administration's existing authority to mandate appropriate requirements to control drug and alcohol use in the rail industry. However, the Department believed that the rigid, inflexible approach taken in H.R. 4748 did not take into account the dynamic and complex circumstances existing in the rail industry. The Department needs the flexibility to work with industry to ensure that the drug programs put into place offer workers the maximum protections while being appropriate for the circumstances in which the testing will take place.

(5B) QUESTION. ON SEPTEMBER 20, 1988, THE HOUSE OF REPRESENTATIVES PASSED H.R. 4748 -- THE RAILROAD DRUG ABUSE PREVENTION ACT. WHAT WOULD BE YOUR REACTION IF A SIMILAR BILL WERE TO BE DEVELOPED TO COVER MERCHANT SEAMEN?

Answer. The Department strongly supports the mandate for random drug testing of safety-sensitive transportation workers but believes that the rulemaking process now underway is the best means of achieving a drug-free working environment for merchant seamen. Of course, flexibility in implementation is very important for the merchant marine industry. Any legislation that mandated a rigid and inflexible drug program for the industry would not be supported by this Department.

QUESTIONS BY THE HONORABLE DON YOUNG, MEMBER, SUBCOMMITTEE ON MERCHANT MARINE, TO THE UNITED STATES COAST GUARD; ALONG WITH REPLIES FROM THE COAST GUARD, DATED 16 NOV 1988

(1) QUESTION. HAS THE COAST GUARD CONSIDERED ANY COSTS TO THE GOVERNMENT WHICH MIGHT BE ASSOCIATED WITH LITIGATION RESULTING FROM A FALSE POSITIVE DRUG TEST?

Answer. The proposed rules require testing in accordance with DHHS guidelines. A test is not reported as "positive" until after confirmatory testing and a review by a Medical Review Officer. Experience with similar test procedures indicates there will be virtually no false positives that might lead to litigation.

(2) QUESTION. DID YOU INCLUDE THE COSTS TO A SHIP OWNER ASSOCIATED WITH ANY LIABILITY AS A RESULT OF A FALSE POSITIVE TEST IN YOUR ECONOMIC ANALYSIS OF THE RULE?

Answer. The Coast Guard feels that the probable incidence of litigation arising out of false positive tests is so minimal that the cost of such litigation was not included in our analysis.

(3) QUESTION. ARE YOU PLANNING TO PROVIDE A WAIVER OF THE PRE-EMPLOYMENT TESTING REQUIREMENTS FOR TEMPORARY EMPLOYEES, SUCH AS BAIT BOYS ON DAY CHARTERS?

Answer. We have received numerous comments concerning testing requirements for temporary employees and employees performing functions not directly involved with the navigation of the vessel. We are considering those comments in the development of our final rule.

(4) QUESTION. YOUR RULE REQUIRES HHS CERTIFICATION OF TESTING LABORATORIES. HOW MANY LABORATORIES ARE CURRENTLY CERTIFIED IN ACCORDANCE WITH YOUR RULE?

Answer. At the present time there are no DHHS certified laboratories. We anticipate that there will be some laboratories certified by November 1988. We have been assured by HHS that there will be sufficient certified laboratories available by the time testing requirements of the rule are implemented.

(5) QUESTION. WHEN LABS ARE CERTIFIED, DO YOU FEEL THERE WILL BE ADEQUATE TESTING CAPACITY TO PROVIDE THE REQUIRED DRUG TESTING AT A REASONABLE PRICE?

Answer. Yes, according to HHS. We have been assured by HHS that there will be sufficient competition among certified laboratories to ensure reasonable pricing.

National Transportation Safety Board
Washington, D.C. 20594

Testimony of
James L. Kolstad, Acting Chairman
National Transportation Safety Board
before the
Committee on Merchant Marine and Fisheries
Subcommittee on Merchant Marine
House of Representatives
March 9, 1988

Mr. Chairman, Members of the Committee, I appreciate this opportunity to appear before you today to discuss the Coast Guard's Notice of Proposed Rulemaking (NPRM) dated July 8, 1988 regarding drug and alcohol testing of merchant mariners. I would like to comment at the outset that the Safety Board believes the Coast Guard's proposed rule to be the most complete and comprehensive of all the modes of transportation.

The Safety Board's continuing concern about the involvement of alcohol and drugs in transportation prompted us to undertake special studies of alcohol and drug involvement in the various transportation modes. In response to your staff request, I would like to share with you some of our findings on one such study on recreational boating, and then I will address specifics of the Coast Guard NPRM.

In a study the Safety Board completed in October 1983, we found that recreational boating accounts for a surprisingly large number of fatalities. In 1987, for instance, 1,036 people were killed in recreational boating accidents.

Alcohol is involved in a tragically high portion of these accidents and deaths. During the course of our study, we obtained data from several states that had attempted to document alcohol involvement in recreational boating accidents. Studies in two states found that one third of all people killed in recreational boating accidents had a blood alcohol content (BAC) of 0.10 percent or higher. In most states, this is the legal level of intoxication.

Although it is clear from our overall study that alcohol plays a major role in boating accidents, information for accurately assessing the full extent of alcohol involvement is insufficient. Its role appears to be seriously understated. The U.S. Coast Guard publishes annual accident data reports, but its information is not complete. The Coast Guard estimates that it receives reports on about 95 percent of the fatal recreational boating accidents, but only ten percent of non-fatal accidents. Nationally, there are no uniform reporting requirements or guidelines for collecting information on the role of alcohol in recreational boating accidents, fatalities or injuries.

Several factors affect the national statistics issued by the Coast Guard. Only in approximately 25 percent of the fatal accidents investigated by the Coast Guard is there verification of the primary and secondary causes of the accident. Compliance with reporting requirements varies from location to location and is influenced by differing state enforcement practices and programs. Boating accident reports usually are completed by the person involved in the accident or their next of kin. It may not be in their interest to provide accurate and objective information about the accident. Undoubtedly, this reliance upon self reporting results in underreporting of alcohol involvement in accidents.

While numbers are important to gauge the scope of the problem, it is individual accidents that bring home to all of us the reality of the tragedy caused by drunk boaters. Let me cite two examples:

- About 2:00 a.m. on September 1, 1986 a 21-foot motorboat collided with a 19-foot motorboat on Fox Lake in northeastern Illinois. The larger boat was headed in a westerly direction at about 45 miles per hour. One of the passengers reportedly saw lights heading toward his boat, yelled to the operator to look out, but his warning was too late. The boat collided with and passed over the bow of the smaller craft, but remained afloat. The bow of the smaller boat was shattered and the boat sank.

The operator and two passengers on the smaller boat received traumatic injuries during the collision and died. The operator of the larger boat also died of traumatic injuries; one passenger thrown from the boat drowned. The only survivor remained on board the larger boat and received minor injuries.

The operator and two occupants of the 19-foot boat had BACs of 0.088 percent, 0.087 percent and 0.062 percent, respectively. The operator of the 21-foot boat and the passenger who drowned both had cocaine present in their bodies, and their BACs were 0.241 percent and 0.036 percent, respectively. The injured person had a BAC of 0.147 percent.

- On May 17, 1987 two recreational boats, one 17 feet long and the other 18 feet long, collided in the Neches River near Beaumont, Texas. The weather was hot and dry, with a light haze which did not affect visibility. A few minutes after 7:00 p.m., the operator of the 17-foot boat was assisting a passenger who had fallen from her seat, and he was not watching the course of his boat. As he was helping the passenger to her seat, another passenger screamed. He looked up and saw the 18-foot boat.

  The northbound 17-foot boat collided with the bow of the southbound 18-foot boat. At impact, the operator of the 17-foot boat and eight of his nine passengers were thrown from the boat. Of the ten occupants of the 17-foot boat, one sustained minor injuries, five sustained serious injuries, and four were either fatally injured at impact or drowned. The operator of the 18-foot boat and four of his five passengers were also thrown into the river from their boat. Of the six occupants of the 18-foot boat, two sustained minor injuries, three sustained moderate injuries, and one required no medical treatment.

  The operator of the 17-foot boat had a BAC of 0.117 percent 4-1/4 hours after the accident. The operator of the 18-foot boat refused the request of law enforcement personnel to submit to alcohol testing.

In our 1983 study, the Safety Board noted two particularly significant problems with boating and alcohol use.

First, we found that there was little or no information available to boaters on how alcohol can affect their ability to operate a boat safely. For example, few boaters realize that they are affected by a blood alcohol level of as little as 0.035 percent. (A 150-pound person could reach 0.035 percent BAC level by drinking as few as 18 ounces of beer or 1-1/2 ounces of 86 proof whiskey in one hour.) Also, very few people understand that there is a tendency to become disoriented in water more than 10 degrees colder than body temperature and that this tendency, called "caloric labyrinthitis," is greatly magnified by alcohol. Put another way, if someone has been drinking and is unexpectedly thrown into the water, there is a high likelihood he/she may swim downward to his/her death rather than upward to safety, because of the effect of alcohol and water on the inner ear.

Second, we found that although some state laws make it illegal to operate a boat while intoxicated, few states provide adequate legal tools for enforcement of the law. In most states there is no defined level of intoxication such as there is for drunk driving; the law does not provide for chemical testing of blood or breath without the operator's consent.

As a result of these legal deficiencies, marine police often do not try to make a drunk boating case when confronted with an intoxicated boat operator. Instead, they charge the offender with reckless boat operation or some other offense.

We need to improve both the laws and the enforcement programs. Few states appear to have marine enforcement programs that emphasize detecting and curbing alcohol abuse. This must be done to enable marine safety authorities to protect the recreational boating public from boaters who have used alcohol.

On December 14, 1987, the Coast Guard published its final rule on alcohol involvement in recreational boating. This rule enables the Coast Guard to enforce the federal prohibition against boating while intoxicated, which was enacted in 1984. In brief, the rule established standards of intoxication for both commercial and recreational marine operators. The definition of intoxication for recreational boaters is 0.10 percent. There also is a behavioral standard for determining intoxication. Refusal to submit to a test is admissible at a hearing and presumptive of intoxication. A law enforcement officer may direct an individual operating a boat to undergo a chemical test whenever reasonable cause exists.

The Coast Guard's rule is the product of an extensive rulemaking process involving dozens of comments from all elements of the recreational boating community. While the final rule does not contain everything that the Safety Board would like, it is a national model that undoubtedly will be copied by many states.

Now I want to comment specifically on the Coast Guard's July 8 NPRM on drug testing of merchant mariners. With your permission, Mr. Chairman, I will provide the complete text of our comments for the record.

Employees Subject to Testing. The Safety Board supports the proposed application of this rule to a broad range of merchant marine personnel. We also recommend that the Coast Guard consider some mechanism for including under the provisions of this rule the shore-based person-in-charge of the loading and unloading of vessels of oil and hazardous chemicals in bulk and his assistants (33 CFR 154). Currently such individuals are not required to be licensed or documented, and therefore, are not covered by the regulations in this proposal. These individuals do, however, have responsibility and influence over public and environmental safety similar to those of the Coast Guard licensed officers and/or tankermen subject to this rulemaking.

The Safety Board also recommends that pilots specifically be included among those marine personnel subject to this rule (Section 4.03-4). State pilots are under the authority of State Pilots Commissions and should be subject to state alcohol and drug regulations comparable to this proposed Coast Guard rule. However, federal pilots are not subject to state commissions and therefore should be monitored by the Coast Guard and should meet the requirements of this drug and alcohol rule.

Post-accident Testing. The Board believes that the proposed 24-hour time limit for post-accident sample collection is excessive and may contribute to delays in post-accident testing of crewmembers and other individuals who may be involved in an accident. Delays in the collection of toxicology specimens can seriously diminish and even invalidate the probative value of drug/alcohol toxicology tests.

Sample collection delays of more than 4 hours seriously limit the ability of tests to detect the parent drug or its psychoactive component(s) such as cocaine, THC, some amphetamines, and PCP in the blood. Information on these components and their respective concentrations in the blood is often vital to the interpretation of possible drug effects on human performance at the time of the accident -- information essential in the determination of the probable cause of the accident.

The Board recommends that the Coast Guard specify a maximum four-hour limit for the collection of post-accident toxicology samples. Failure to collect a sample within this period should result in an appropriate penalty to the employer and/or employee. Because toxicological samples collected even after 4 hours may provide some useful information, samples should still be collected even if the four-hour period has expired.

Random Testing. The Board believes that aggressive reasonable cause testing (triggered by any of a wide range of potentially safety-related errors or work behavior patterns), combined with effective management supervision of employees, post-accident/incident testing, pre-employment testing, periodic (medical) testing, and competent drug/alcohol education and treatment are the essential components of an effective anti-drug/alcohol abuse program. The Board recommends that the Coast Guard first require marine employers to implement fully these critical program measures before embarking on additional measures, such as random testing.

However, should the Coast Guard choose to include random testing in the final rule, the Safety Board would make this point: to be effective, random testing must be performed on a substantial proportion of employees and on a sufficiently frequent basis to be perceived as a credible deterrent, as the Coast Guard's own testing program now does. Although the Safety Board is aware of no research indicating which frequency/sampling proportion creates a deterrent, we suspect that the "effectiveness" threshold is closer to the upper level of testing (125 percent) presented in the NPRM than it is to lower levels. Each employee must be convinced that he or she might be tested at any time, including soon after his or her first yearly random test, to preclude drug use in the interim between random testing cycles.

Employee Assistance Programs. The Safety Board concurs in the proposed requirement that employers provide employee assistance programs (EAPs) for their personnel. As mentioned previously, the Board believes that drug education and training are vital components of effective anti-drug and alcohol abuse programs. Beyond the humanitarian value of rehabilitation, there may also be a safety benefit. If successfully rehabilitated, the trained and experienced employee may well be safer than a novice employee less familiar with the demands of the job. The Board supports the one-time opportunity for participation in drug/alcohol rehabilitation programs defined in Option 3 for identified drug/alcohol users. Employers should be required to remove from service all those employees in safety-sensitive positions when testing confirms drug or alcohol use. Without mandatory suspension, drug and alcohol testing programs have little or no deterrent value.

Accuracy and Competence of the Testing Program. One of the key components of the potential success of this proposed Coast Guard rule is the accuracy and competence of the drug and alcohol testing programs to be employed by the aviation industry. As the Federal Railroad Administration experienced, few issues surrounding proposed alcohol and drug rules generate as much controversy among employees and their unions as the concern over the accuracy/competence of drug testing. The Safety Board shares the view that drug testing programs, whether operated by federal agencies or individual companies, should meet the highest standards for scientific accuracy and validity. Therefore, the Safety Board strongly concurs with the requirement that all drug testing laboratories performing drug/alcohol testing (under the authority of the proposed rule) meet the scientific and technical requirements of the Department of Health and Human Services Guidelines (52 FR 30638, August 14, 1987).

Employee Privacy. The preamble to the NPRM (53 FR 25939) raises a series of questions regarding the circumstances under which test results could be released by an employer to third parties. This rule should be written so that it does not conflict with the Safety Board's statutory authority and responsibility to gather evidence in its accident investigations. The Independent Safety Board Act of 1974 (49 USC 1901 et. seq.) clearly gives the Board power to obtain physical samples or test results necessary for its investigations. In the event of a deceased operator, the Board may order the autopsy or seek other tests as may be necessary, or obtain a copy of the autopsy performed by State or local officials [49 USC 1903 (b)(5)]. If the operator survives, the Board may obtain physical evidence or reports on tests, by issuing a subpoena, if necessary [49 USC 1903 (b)(1 and 3)].

The final rule should clarify that the Board has authority to obtain this evidence in the course of its accident investigations. In this way, employers will not be confused with respect to the authority of the Safety Board in accident investigations. Doing so will alleviate the problem of employer reluctance to release information to the Safety Board.

Questions also are raised with respect to the release of test results to subsequent employers. The Safety Board has not previously addressed this issue with respect to the release of drug test results. However, the Board does believe that a prospective employee's prior job performance should be an important consideration in an employer's hiring decision. Certainly, any prospective employer considering an applicant for a safety-sensitive position in transportation should have access to drug and alcohol test results obtained under this rule.

Alcohol Testing. The Safety Board is pleased that alcohol testing is included in this rule. The accident statistics presented in the preamble to this rule and elsewhere demonstrate that there is no question that alcohol remains the most widely abused drug. Additionally, the Safety Board is pleased by the proposal in Sec. 4.06-15(f) to consider any BAC reading above 0.02 percent as a positive test result. The Board has consistently recommended to the Coast Guard and others that the permissible blood alcohol level for commercial transportation operators be reduced below 0.04 percent. Therefore, this is an encouraging step toward the adoption of our recommended policy.

Mr. Chairman, that completes my formal statement. I will be pleased to answer any questions you may have.

National Transportation Safety Board
Washington, D.C. 20594

Office of the Chairman

September 9, 1988

Executive Secretary
Marine Safety Council (G-LRA-2/21)
U.S. Coast Guard
Washington, D.C. 20593

Dear Madam/Sir:

The National Transportation Safety Board (NTSB) has reviewed your Notice of Proposed Rulemaking (NPRM), "Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel" which appeared in the July 8, 1988, Federal Register (53 FR 131). The Coast Guard is to be commended for crafting one of the most complete and comprehensive drug and alcohol rules in the various modes of transportation. The Safety Board offers the following specific comments on the rule for the Coast Guard's consideration:

1. Employees Subject to Testing. The Safety Board supports the proposed application of this rule to a broad range of merchant marine personnel. The Board also recommends that the Coast Guard consider some mechanism for including under the provisions of this rule the shore-based person-in-charge of the loading and unloading of vessels of oil and hazardous chemicals in bulk and his assistants (33 CFR 154). Currently such individuals are not required to be licensed or documented, and therefore, are not covered by the regulations in this proposal. These individuals do, however, have responsibility and influence over public and environmental safety similar to those of the Coast Guard licensed officers and/or tankermen subject to this rulemaking.

   The Safety Board also recommends that Federal pilots be specifically included among those marine personnel subject to this rule (Section 4.03-4). State pilots are under the authority of State Pilots Commissions and should be subject to State alcohol and drug regulations comparable to this proposed Coast Guard rule. However, Federal pilots are not subject to State commissions and therefore should be monitored by the Coast Guard and should meet the requirements of this drug and alcohol rule.

2. Post-accident Testing. The Board believes that the proposed 24-hour time limit for post-accident sample collection is excessive and may contribute to delays in post-accident testing of crewmembers and other individuals who may be involved in an accident. Delays in the collection of toxicology specimens can seriously diminish and even invalidate the probative value of drug/alcohol toxicology tests.

Sample collection delays of more than 4 hours seriously limit the ability of tests to detect the parent drug or its psychoactive component(s) such as cocaine, THC, some amphetamines, and PCP in the blood. Information on these components and their respective concentrations in the blood is often vital to the interpretation of possible drug effects on human performance at the time of the accident -- information essential in the determination of the probable cause of the accident.

For the determination of possible alcohol impairment, even a 4-hour delay can preclude the detection of alcohol in the body, because of its rapid rate of elimination in the body. Most States, for example, establish a 3-hour limit for the collection of breath/blood alcohol samples for highway law enforcement purposes. The Board acknowledges that, in some instances, the collection of a sample within 4 hours (or at all) will be impossible. However, on-board testing kits would make testing within this time period feasible. (In Subpart 4.06-1(A)(3), marine employers should be required to ensure that blood and urine sampling and shipping kits are maintained on board unless personnel can be made available for sample collection within 4 hours of a serious marine incident.) Given the widespread availability of medical facilities and emergency transportation in the U.S., the testing of individuals on vessels in or near intra-coastal or continental waters should also be possible in most cases.

Therefore, the Board recommends that the Coast Guard specify a maximum 4-hour limit for the collection of post-accident toxicology samples. Failure to collect a sample within this period should result in an appropriate penalty to the employer and/or employee. Because toxicological samples collected even after 4 hours may provide some useful information, samples should still be collected even if the 4-hour period has expired.

3. Random testing. The NTSB believes that aggressive reasonable cause testing (triggered by any of a wide range of potentially safety-related errors or work behavior patterns), combined with effective management supervision of employees, post-accident/incident testing, pre-employment testing, periodic (medical) testing, and competent drug/alcohol education and treatment are the essential components of an effective anti-drug/alcohol abuse program. The Board recommends that the Coast Guard first require marine employers to implement fully these critical program measures before embarking on additional measures, such as random testing.

However, should the Coast Guard choose to include random testing in the final rule, the Safety Board would raise the following concern: To be effective, random testing must be performed on a substantial proportion of employees and on a sufficiently frequent basis to be perceived as a credible deterrent. Although the Safety Board is aware of no research indicating which frequency/sampling proportion creates a deterrent, we suspect that the "effectiveness" threshold is closer to the upper level of testing (125 percent) presented in the NPRM than it is to lower levels. Each employee must be convinced that he or she might be tested at any time, including soon after his or her first yearly random test, to preclude drug use in the interim between random testing cycles.

4. Employee Assistance Programs. The Safety Board concurs in the proposed requirement that employers provide employee assistance programs (EAPs) for their personnel. As mentioned previously, the Board believes that drug education and training are vital components of effective anti-drug and alcohol abuse programs. Beyond the humanitarian value of rehabilitation, there may also be a safety benefit. If successfully rehabilitated, the trained and experienced employee may well be safer than a novice employee less familiar with the demands of the job. The Board supports the one-time opportunity for participation in drug/alcohol rehabilitation programs defined in Option 3 for identified drug/alcohol users. The Board believes that employers should be required to remove from service all those employees in safety-sensitive positions when testing confirms drug or alcohol use. Without mandatory suspension, drug and alcohol testing programs have little or no deterrent value. Furthermore, the rule should spell out in detail the supervisory controls and follow-up testing regimen for drug abusers who have voluntarily submitted to Employee Assistance Program rehabilitation before being tested in one of the types of involuntary testing under the rule and found positive.

5. Accuracy and Competence of the Testing Program. One of the key components of the potential success of this proposed Coast Guard rule is the accuracy and competence of the drug and alcohol testing programs to be employed by the aviation industry. As the Federal Railroad Administration experienced, few issues surrounding proposed alcohol and drug rules generate as much controversy among employees and their unions as the concern over the accuracy/competence of drug testing. The Safety Board shares the view that drug testing programs, whether operated by Federal agencies or individual companies, should meet the highest standards for scientific accuracy and validity. Therefore, the Safety Board strongly concurs with the requirement that all drug testing laboratories performing drug/alcohol testing (under the authority of the proposed rule) meet the scientific and technical requirements of the Department of Health and Human Services Guidelines (52 FR 30638, August 14, 1987). Because the HHS Guidelines contain restrictions that are either inconsistent with the above comments (e.g., applying only to urine testing, only a limited set of drugs, etc.) or inappropriate for private sector testing programs (e.g., specifying certain reporting requirements), the Safety Board recommends that RSPA work closely with the National Institute on Drug Abuse to refine Guideline requirements for this application.

6. Employee Privacy. The preamble to the NPRM (53 FR 25939) raises a series of questions regarding the circumstances under which test results could be released by an employer to third parties. This rule should be written so that it does not conflict with the Safety Board's statutory authority and responsibility to gather evidence in its accident investigations. The Independent Safety Board Act of 1974 (49 USC 1901 et. seq.) clearly gives the Board power to obtain physical samples or test results necessary for its investigations. In the event of a deceased operator, the Board may order the autopsy or seek other tests as may be necessary, or obtain a copy of the autopsy performed by State or local officials [49 USC 1903 (b)(5)]. If the operator survives, the Board may obtain physical evidence or reports on tests, by issuing a subpoena, if necessary [49 USC 1903 (b)(1 and 3)].

   The final rule should clarify that the Board has authority to obtain this evidence in the course of its accident investigations. In this way, employers will not be confused with respect to the authority of the Safety Board in accident investigations. Doing so will alleviate the problem of employer reluctance to release information to the Safety Board.

   Questions also are raised with respect to the release of test results to subsequent employers. The Safety Board has not previously addressed this issue with respect to the release of drug test results. However, the Board does believe that a prospective employee's prior job performance should be an important consideration in an employer's hiring decision. Certainly, any prospective employer considering an applicant for a safety-sensitive position in transportation should have access to drug and alcohol test results obtained under this rule.

7. Alcohol Testing. The Safety Board is pleased that alcohol testing is included in this rule. The accident statistics presented in the preamble to this rule and elsewhere demonstrate that there is no question that alcohol remains a widely abused drug. Additionally, the Safety Board is pleased by the proposal in Sec. 4.06-15(f) to consider any BAC reading above 0.02 percent as a positive test result. The Board has consistently recommended to the Coast Guard and others that the permissible blood alcohol level for commercial transportation operators be reduced below 0.04 percent. Therefore, this is an encouraging step toward the adoption of our recommended policy.

The Safety Board appreciates the opportunity to comment on this rulemaking proposal.

Respectfully,

ORIGINAL SIGNED BY
JIM BURNETT

James L. Kolstad
Acting Chairman

PREPARED STATEMENT OF ALLAN ROBERT ADLER, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION, BEFORE THE SUBCOMMITTEE ON MERCHANT MARINE, 22 SEPTEMBER 1988

Mr. Chairman and Members of the Subcommittee:

On behalf of the American Civil Liberties Union (ACLU), I would like to thank you for inviting me here today to briefly discuss the Coast Guard's pending proposal to require mandatory drug testing for merchant marine personnel. See Notice of Proposed Rulemaking, "Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel," 53 Fed.Reg. 25,926 (1988) (to be codified at 46 C.F.R. Parts 4, 5, and 16) (July 8, 1988).

In the two years since President Reagan's Executive Order 12564 required federal agencies to establish mandatory urinalysis drug testing programs for federal civilian employees and job applicants, there have been aggressive efforts by some Members of Congress and components of the Department of Transportation to require private employers in the transportation field to impose the same testing requirements on their present and potential personnel. The Coast Guard proposal you are considering today was preceded in the Federal Register by similar rulemaking notices from the Urban Mass Transportation Administration, the Federal Aviation Administration, the Federal Railroad Administration and the Federal Highway Administration.

During that same period of time, there have been equally aggressive efforts, most often led by the ACLU and a variety of labor unions, to oppose implementation of such programs. Thus far, without a decision on point from the Supreme Court, there is a substantial divergence of judicial opinion regarding the constitutionality of such testing programs. Although all courts appear to agree that government-mandated urinalysis drug testing constitutes a "search" within the meaning of the Fourth Amendment, judges have reached different and even contradictory conclusions regarding the "reasonableness" of this type of search when they engage in the prescribed process of balancing the government's interest in requiring the tests against the intrusion into protected privacy interests that results from conducting them.

In the interest of brevity and a desire to avoid excessive legal citation and argumentative legal analysis, I would broadly but fairly describe the current case law along the following line of division:

> On the one hand, an overwhelming majority of mostly state and lower federal courts have held that government-mandated urinalysis drug testing constitutes an "unreasonable search" in violation of the Fourth Amendment when imposed as a condition of employment in the absence of an individualized reasonable suspicion of drug abuse. In these cases involving firemen, policemen, school teachers, attorneys and a variety of other public employees, the multi-dimensional intrusiveness of such testing, combined with the test proponent's inability to demonstrate the need for testing on the basis of evidence of a drug problem within the group of individuals to be tested, recur as factors which decisively tip the balance against random, mass-scale or post-accident testing in these cases.

On the other hand, another body of cases, in the numerical minority but on the ostensibly more authoritative federal appellate level, has upheld the "reasonableness" of government-mandated urinalysis drug testing that is not predicated on any individualized reasonable suspicion of drug abuse. These cases, involving the testing of persons viewed as having significant safety, security or law enforcement responsibilities, have concluded that the nature of these duties gives such persons a diminished expectation of personal privacy in the face of a heightened government interest in determining whether they are users of illegal drugs -- tipping the balance in favor of the proponents of testing. Curiously, a substantial number of these cases have relied upon the rationale of a Third Circuit decision which applied the Supreme Court's doctrine of an "administrative search" exception to the Fourth Amendment's warrant and probable cause requirements in upholding a State racing commission's authority to subject licensed jockeys to testing without cause. Despite the fact that the Supreme Court had only applied this doctrine in "relatively unique circumstances" involving inspections of commercial properties, the courts in these cases justified the vastly more personally-intrusive urinalysis tests on the grounds that the persons to be tested were employed in "pervasively-regulated businesses" and, therefore, had diminished expectations of personal privacy.

Mr. Chairman, based on this thumbnail sketch of the case law on the constitutionality of government-mandated urinalysis drug testing, the proposed program of the Coast Guard for requiring urinalysis drug testing of merchant marine personnel would appear to be under a serious Fourth Amendment cloud.

First, as the Coast Guard itself admits, the government's data are "sparse" and "not conclusive" and "do not specifically identify the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage." Instead, the Coast Guard seeks to justify testing on the assumption that "because there is a drug problem in society, there is also a potential drug problem in the merchant marine." This justification will simply not wash. Under the majority of court cases, arguments for testing without cause which are based on a theory of deterrence must rest on evidence that a drug problem which threatens an identifiable, "work-related" interest actually exists within the targeted workforce.

Second, if the testing is to be justified on the proponent's interest in ensuring the "fitness for duty" of merchant marine personnel, this rationale must fail as well. Since urinalysis testing cannot provide any present or predictive evidence regarding an individual's impairment on the job, it lacks a necessary nexus to the asserted supporting interest.

Third, the Coast Guard's effort to turn the testing requirement into one of "implied consent" is disingenuous. Faced with suspension or revocation of documentation necessary to pursue a livelihood in the merchant marine, it is cynical to insist that merchant marine personnel will be exercising their free will in assenting to testing under the circumstances. The threatened loss of documentation is coercion, pure and simple.

Fourth, even if one were to accept the "administrative inspection" rationale to justify urinalysis testing without a predicate reasonable suspicion, such an exception would not be justified here because the merchant marine cannot fairly be characterized as a "pervasively-regulated business" within the meaning of the Supreme Court's explication of the phrase.

Beyond these considerations, Mr. Chairman, you and your colleagues must closely and skeptically examine the figures put forth by the Coast Guard in presenting its approximation of "Program Costs." The Reagan Administration has been less than forthcoming in confronting the substantial financial costs and administrative burdens associated with ensuring the integrity of a large-scaled drug testing program. These estimates should be checked with the General Accounting Office, which has already explored some of the less realistic assessments made by the Administration in connection with other proposals.

TESTIMONY

OF

JOSEPH FARRELL
PRESIDENT
THE AMERICAN WATERWAYS OPERATORS (AWO)

ON

PROPOSED FEDERAL PROGRAMS ON DRUG TESTING

PRESENTED BEFORE

SUBCOMMITTEE ON MERCHANT MARINE
COMMITTEE ON MERCHANT MARINE AND FISHERIES
UNITED STATES HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 1988

Mr. Chairman and Members of the Subcommittee:

I am Joe Farrell, President of the American Waterways Operators (AWO), the national trade association representing both the inland and coastal barge and towing industries. I appreciate the opportunity to discuss our views on the Department of Transportation's proposed drug testing requirements for the maritime industry. I will frame our comments on this proposal by first sketching for the Subcommittee an outline of the barge and towing industry.

The Barge and Towing Industry

AWO member companies operate towboats, tugboats and barges on the inland waterways system and the East, West and Gulf coasts. Over half of the onboard jobs in the U.S. merchant marine have been created by the towing industry. In a typical year, there are more than 125,000 moves to and from over 200 U.S. cities; 87 percent of all U.S. cities are served by tug-barge movements. Almost 60 percent of grain exported by the United States is moved to seaports in barges, and one of every five tons of coal produced in the nation is carried by barge. Barge transportation accounts for 40 percent of U.S. petroleum movements. Our vessels transport about fifteen percent of the nation's intercity freight for just two percent of the total freight bill.

Trains, planes, and trucks are more familiar to the general public than barges and towboats, but they are no more important. Quietly, safely and efficiently--almost invisibly--the barge and towing industry carries America's most critical cargoes. To illustrate the magnitude of the volume transported by our industry, it would take at least 15 railroad cars or more than 60 trucks to fill a single barge. The typical southbound Mississippi River tow consisting of 30 barges has a cargo capacity equivalent to 450 rail cars, or more than 1800 trucks.

The Challenge of the Drug Crisis

Mr. Chairman, AWO believes the subject of today's hearings, federal programs designed to eliminate the intensity of America's illicit drug usage, is an uncommonly important matter and one which uniquely belongs within the ambit of the Congress of the United States. This is the people's branch of government and drugs are surely a problem for the American people. I am not so sure that drugs in America aren't beginning to rival the plagues of medieval times. Drugs have invaded all corners of American life. That includes the barge and towing industry, of course, but the drug crisis is a tragic national burden, the solution to which must be shared in one way or another by all our citizens.

The great challenge facing the federal government is to lead us to the proper and equitable sharing of the burden. No one must be required to do what he cannot do. Or, should not do. Or, what he is protected from doing by our Constitution. Only the federal government is able to draw the line which divides what should be reserved for the public sector and what should be the role of the private sector. And, in drawing that line, the government must be guided by what is permissible under the Constitution, and what is not.

The Schedule of the Regulatory Proposal is Ill Advised

AWO supports the development and implementation of an effective regulatory program to rid the maritime industry of drug usage and alcohol abuse. We intend to work closely with the Department of Transportation in the deliberative, analytical process which is critical to the development of a program which is practical, manageable, effective, and of proper scope. The most important message which we can bring to you today is that notwithstanding our support for this program, we are appalled by the apparent sudden rush by DOT to implement drug regulations on a schedule which will ensure that they are inadequate to effectively address the real proportions of this problem.

We sense in all this...in the Executive and Legislative branches posturing on drugs... a fragrance of partisan politics in an election year. While we understand the impulse to seek partisan advantage, it is surely misplaced on a matter of this magnitude. Drug abuse in America will be immensely difficult to defeat; partisan warfare or one-upmanship will only play into the hands of the drug lords and their huge criminal armies.

What the federal government, through the Department of Transportation, is proposing is a program of massive proportions to achieve a drug and alcohol abuse free marine transportation environment. The centerpiece of the proposed program is an elaborate and extensive mandatory private sector testing regime, accompanied by employee rehabilitation and training. The annual costs to the private sector of the various parts of the program are difficult to compute, but educated estimates run in the tens of millions of dollars.

The barge and towing industry has an enviable record of supporting regulations which are designed to remove intoxicants from the marine environment. That record is buttressed by scores of corporate programs, voluntarily instituted, which absolutely prohibit the possession or consumption of any intoxicant, drug or alcohol, aboard commercial vessels. The barge industry participated heavily in the Coast Guard rulemaking last year to develop intoxication standards for commercial vessel personnel. The record of that rulemaking is a clear reflection of our commitment to an intoxicant-free marine environment. Indeed, the Final Rule implemented by the Coast Guard included more comprehensive, stringent and effective regulations to prohibit intoxication aboard vessels than the weaker provisions originally contained in the Notice of Proposed Rulemaking. These improvements were the direct result of the suggestions which AWO and its member companies developed and supported.

The most immediate and acute problem with the DOT proposal is the schedule on which it is proceeding. We doubt that the Coast Guard and the Department will be able to craft practical and effective regulations on the basis of the proposal published in July and the comments submitted in response to the provisions of that proposal. To digress for a moment into the parlance of regulatory proceedings, the proposal reads very much like an Advanced Notice of Proposed Rulemaking, asking scores of questions, soliciting industry reaction to loosely-defined problems, and in several instances not proposing specific and precise regulations for industry to consider. Yet, on its current schedule, DOT proposes to leap from these undefined positions to enduring regulatory requirements. The apparent intent of the Department of Transportation to proceed with regulations at this time seems foolish in the face of recent court decisions which find the testing requirements of the proposal to be constitutionally infirm. Why put something as important as this is out, then be forced by the Courts to withdraw it?

There is a range of opinion within AWO on the proper role of the private sector in testing programs. The pros and cons of industry involvement in those tests can be fully ventilated on a rulemaking docket which gives adequate time for public comment and government analysis. However, notwithstanding one's view of the desirability of these testing programs, it would at least appear that we can all agree that regulations should not be adopted when there is still a substantial question regarding their constitutionality. The U.S. Court of Appeals for the Ninth Circuit ruled earlier this year in the case of Railway Labor Executives' Association v. James H. Burnley that the Federal Railroad Administration regulation mandating post-accident testing is a violation of an employee's Constitutional protection against unreasonable searches and seizures under the Fourth Amendment. The Circuit Court decision is scheduled for Supreme Court review in the Fall term. We understand that it has been scheduled for argument on November 2, 1988.

Furthermore, in July, the United States District Court for the District of Columbia in Mark B. Harmon, et al., v. Edwin Meese III, et al. enjoined the Department of Justice from implementing a mandatory random drug testing program for certain of its employees on similar constitutional grounds. The Harmon case holds an interesting parallel to our concerns with the timing of the DOT proposal. In that proceeding before the U.S. District Court, the Justice Department argued against an injunction in part on the basis of its need to quickly implement the random testing program. The District Court decision is instructive on this point, finding no urgent need for the Department of Justice to implement its program by August 26, 1988. The Court stated that the Department would "...at most, be inconvenienced by postponement of the program should the Court ultimately rule in Defendants' favor. Another reason for maintaining the status quo is that the Supreme Court has agreed to review two drug testing cases. The Supreme Court's decision in those cases will likely control the ultimate disposition of this case."

In August, the U.S. District Court for the Northern District of California in John D. Quadros v. Ronald W. Reagan stayed an attempt by the National Weather Service to implement a random testing program for certain of its employees. The Court concluded that not enjoining the government rule would result in immediate and irreparable injury to the Fourth Amendment rights of the plaintiffs.

Post-accident and random testing requirements are both key elements of the DOT proposal and we believe that it is ill-advised to require companies to implement federally-required programs until the Supreme Court has addresed their constitutionality.

The Proposal Is Not Sufficiently Flexible

Some will argue that we must either opt for the full testing regime, or no testing regime. Some suggest that each of the five tests which the Department of Transportation proposes--periodic, pre-employment, random, reasonable cause, and post-accident--is an integral part of the whole. Drop one out and the entire effort is significantly set back in effectiveness terms. The proper scope of the testing regime can be best defined through a comprehensive rulemaking process. It appears to us that the appropriate and effective approach is in a flexible rule which allows companies to craft testing programs that best meet their individual needs and the character of their operations. The rigid testing program set forth in the Notice or Proposed Rulemaking suggests that all marine companies can march together in regulatory lockstep in eliminating intoxicants from the workplace. That is simply not workable.

Managing such a scheme under ideal circumstances would be a challenge. But, the actual circumstances existing in the barge and towing industry shatter any notion of ideal. The industry is made up of companies from tiny to giant in size, and consists of a population of seamen who tend to shift companies, sometimes often, and who guide vessels on voyages sometimes lengthy and remote.

We believe that a more modest, manageable and flexible program has a significantly better chance of meeting the objective which DOT has established and an enhanced likelihood of success. That program must be crafted with the care it commands, not in the crucible of election year politics.

The Basis of the Proposal Is Flawed

Crafting that program with care also suggests that both industry and government take a close look at the demonstrated need for the program, for the Courts surely will. AWO is concerned that the lack of specific data identifying an intoxicant problem in the merchant marine will at least make this regulation premature in the eyes of the Courts. We draw the Subcommittee's attention to the disparity between recent Court decisions on the matter of identifying the intoxicant problem and Coast Guard conclusions in the preamble of the Notice of Proposed Rulemaking. The Coast Guard states in the preamble:

> Coast Guard data do not specifically identify the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage.

After providing the data that it has accumulated on the casualties attributable to the use of intoxicants, the Coast Guard goes on to state:

> It is acknowledged that the above data are sparse and not conclusive.

The growing body of case law regarding governmentally-mandated drug testing programs shows that the Courts do not look with favor on testing requirements which are imposed in the absence of any evidence of widespread or significant drug use among the regulated population. Indeed, Courts have either enjoined or found unconstitutional random drug testing programs which were based on sparse evidence of drug usage among the federal employees to be tested. In Harmon v. Meese, Judge George H. Revercomb wrote:

> There is simply no nexus between what the search is expected to produce and the government interest. The defendant's justifications for testing incumbents within each section of the Offices, Boards and Divisions of the Department of Justice portray an alarming picture of what could happen if an incumbent abused drugs. Fortunately, defendants have "no reason to believe that drug use is widespread in the Department of Justice." Given that defendants do not consider drug abuse to be widespread within the Department, however, it is impossible to argue that mandatory random urinalysis testing serves the purpose of deterring illegal drug use by trusted and apparently law-abiding employees. In other words, defendants cannot claim a compelling governmental interest in deterring something that poses no threat and therefore does not need to be deterred.

We believe that there is a strong parallel between the Coast Guard's analysis that drugs and alcohol are not a major causal factor in commercial vessel casualties and the Justice Department's finding in its proceeding. Therefore, the Court's finding in Harmon which concludes that testing is inappropriate absent the demonstration of a drug or alcohol problem is directly relevant and instructive.

Eliminating Intoxicants Requires a Governmental Role

Finally, Mr. Chairman, allow me to address one additional component of the DOT proposal which we find particulary egregious. One can hardly emerge from a reading of this proposed rule and not be struck by the absence of any governmental role in achieving DOT's objective of eliminating intoxicants from the maritime industry. In each of the three major components of the proposal, testing, rehabilitation and education, DOT suggests no meaningful role for itself or the Coast Guard to complement industry's efforts. In some instances, that is appropriate and understandable. However, in others, it is just as clearly wrong and irresponsible.

AWO believes that the absence of a governmental role is most objectionable in the matter of post-accident testing. This is a police and investigative function which properly resides in government, not in industry. We believe it is fundamentally incorrect that the NPRM contemplates no role for the agency with statutory responsibility for marine safety and law enforcement in this testing activity, but instead seeks to inappropriately shift this responsibility onto the back of industry. It seems to us that if the Department is truly committed to an effective drug and alcohol deterrent program, it would be not only willing, but anxious to participate in the components of that program and to allocate the necessary financial resources to fund these activities.

The costs imposed by any federal programs which address freeing the society from drug abuse should be borne by more than a narrow industry sector. The drug problem is a national one and should command national resources and, to an appropriate extent, those citizens who have a drug addiction problem. It seems to AWO, therefore, that the federal government should consider establishing a non-profit insurance fund to pay for rehabilitation of citizens who fall under the rubric of all federally regulated programs to identify and assist users of illicit drugs. Funding would be borne in a proportional, and fair, measure by the government, the private sector involved, the individual to be treated, and labor unions where fitting.

Conclusion

Mr. Chairman, we feel it is extraordinarily important to call this one exactly as we see it. We believe the emperor has his clothes on, but his garment is wrong for the season and, to some degree, in poor taste. We trust that your leadership will help get him dressed properly. What is finally adopted must give us all the assurance that it is carefully derived, legally sound, affordable, and effective.

AWO asks that the Congress express to the Secretary of Transportation, in forceful and vigorous terms, its concern with the precipitous schedule on which the Department's proposal is proceeding, the inflexibility of what is being proposed and the absence of a proper role for the government in all this. Foisting on the maritime industry a hastily-considered, poorly-crafted and constitutionally-infirm regulation will not only do little to effectively address the drug and alcohol problem, but will almost surely in the long term retard the goal we all share: protecting our industry from the drug scourge.

Thank you for the opportunity to submit our views.

STATEMENT OF
WILLIAM P. VERDON, PRESIDENT
UNITED SHIPOWNERS OF AMERICA

RE

PROPOSED UNITED STATES COAST GUARD RULES
FOR DRUG TESTING OF MERCHANT SEAMEN
BEFORE THE SUBCOMMITTEE ON MERCHANT MARINE
OF THE COMMITTEE ON MERCHANT MARINE AND FISHERIES
SEPTEMBER 22, 1988

Good morning Mr. Chairman and members of the Subcommittee. I am William P. Verdon, President of the United Shipowners of America (USA), a national trade association whose members own and operate about 97% of all U.S.-flag liner vessels engaged in international trade.

As major employers of U.S. seamen, these companies will be directly and seriously affected by the drug testing rules for merchant seamen proposed by the United States Coast Guard.

There is no doubt that drugs are a serious problem in our society, and we wholeheartedly support all efforts to achieve a drug-free America. However, to implement the proposed rules over two years in the drafting by the government with only a 60-day comment period by our industry would be a grave error.

A very noticeable flaw in the proposed regulation is the fact that the Coast Guard has not clearly demonstrated the role of illegal drugs in marine casualties. We are not aware of evidence to support the need for drug testing on U.S.-flag liner vessels trading in international commerce. Our member companies are not aware of any serious casualty occurring on their vessels which is related to any use of drugs. There is no analogy between our industry and the problems encountered and documented in the railroad industry. This regulation is designed to fix a problem for which we do not have empirical data that suggests or proves that there is a major problem. As such it runs counter to the wave of deregulation in America today and appears to be regulation for the sake of regulation.

The avowed purpose of the proposed rules is to increase safety in the maritime industry. However, they will apply only to a mere four percent of the ships engaged in the foreign commerce of the United States since our already over-regulated industry today carries only four percent of our foreign commerce. Outside of U.S. ports the U.S. fleet is even more insignificant, representing only about two-tenths of one percent of all of the world's oceangoing vessels of over 1,000 deadweight tons.

The proposed rules will exacerbate an already uneven playing field between U.S.-flag vessels and their foreign flag competitors. As they are written, only U.S.-flag vessels would be subject to millions of dollars in costs, which would further erode the competitive position of U.S. carriers through schedule delays and inconvenience to U.S. exporters and importers.

A survey of USA's member companies reveals that at the present time the average age of licensed crew members on our vessels is forty-five years and that of our unlicensed seamen is fifty-one years. All existing statistics point to the fact that abuse of illegal drugs in this age category is not significant and certainly not a national problem. To enact a far-reaching and constitutionally questionable regulation to mandate drug testing of people in this age category when there is no evidence of a drug problem or a safety problem caused by drug abuse is both arbitrary and capricious.

Furthermore, there already exists an inspection system under the auspices of the Customs Department, wherein every U.S.-flag vessel is subject to random and intensive searches, not only at U.S. ports, but also in foreign ports and even at sea.

It is surprising that the Government assumes that if there is drug abuse in society at large, then there must be drug abuse aboard oceangoing vessels. The Government justifies its proposed drug testing rules on "safety and health concerns." This is the justification which allows them to overcome ordinary constitutional protections and the American spirit of the right of individual freedom from illegal search and seizures, as well as the right against self-incrimination. Where the safety of the society is at risk or the health of the nation in peril, well-tailored drug testing schemes may be needed. That is not the case here.

USA strongly believes that the core elements found in the proposed regulation must be subject to collective bargaining between unions and management of shipping companies. Management and unions jointly are in favor of a drug-free environment aboard our vessels and have been working together to ensure a drug-free and safe environment.

Since well before the Coast Guard's proposed rules were published, there were ongoing discussions between union and management regarding the possible need for drug testing, rehabilitation and sanctions. This approach allows careful tailoring of solutions by responsible company and union officials if problems should occur. In this regard, we call your attention to MEMORANDUM CG 87-5 from the Office of the General Counsel of the National Labor Relations Board on September 8, 1987, which in its second paragraph states that drug testing for current employees and job applicants is a mandatory subject of collective bargaining.

The U.S. government has worked on the proposed rule for approximately two years. It has had the ability to draw upon resources from other departments and agencies with great expertise in these matters. Despite all that time and expertise, the rule asks almost 100 complex and vexing questions of industry. These issues demand a working relationship and a constructive dialogue between the government and the governed, and we respectfully request that this Committee urge the Coast Guard to hold hearings in order to give the public an opportunity to present its views. The following is a list of issues which USA suggests need investigation, research, clarification and discussion:

(1) How to merge the proposed rulemaking with the collective bargaining agreements and requirements.

(2) How private initiative by shipping companies is dealing with the issues.

(3) Constitutional and confidentiality issues on the various forms of drug testing.

(4) Are the Coast Guard's cost estimates reasonably correct? Accurate estimates may require the need for an Economic Impact Statement.

(5) Statistical information on casualties caused by substance abuse to assess whether there is a safety concern in the deep sea international liner industry.

(6) Stastical information on the use or non-use of drugs by merchant seamen.

(7) Existing safeguards against drugs on board vessels and their effectiveness.

(8) Standards to be used for specimen collection, testing and processing: HHS guidelines or authorized laboratories meeting forensic standards.

(9) The inherent problems of random testing while at sea.

(10) Rehabilitation of short-term employees. (Approximately fifty percent of all employees are not permanently hired.)

(11) How often should pre-employment tests be given or required? Should there be an exemption from a pre-employment test if an applicant has tested negative during a given time period such as three or six months prior to application or dispatch to a new employer?

(12) Is it feasible to establish a permanent document similar to a vaccination card in which all test results are entered?

(13) If it is decided that drug testing is needed, shouldn't the Government administer and pay for the program?

(14) Should the Coast Guard establish a rule whereby a true deterrent against drug abuse would be established; i.e., a progressive disciplinary procedure which results in loss of Coast Guard documentation and therefore loss of ability to sail.

USA's member companies are prepared to support the following reasonable and practicable program to ensure that drug-related problems do not arise in the U.S.-flag liner industry in the future.

With regard to the concept of a pre-employment drug test, USA members would support such a regulatory mandated test although we firmly believe that in cooperation with our unions we could set up such a system on a volunteer basis at our option. Indeed, as stated earlier, we are already discussing such an issue with our respective unions. Any pre-employment testing will have to be crafted to take into account that a sizeable percentage of employees in this industry are casual employees. A request for pre-employment testing every time an employee changes jobs would be too burdensome. Some system will have to be worked out to allow a pre-employment drug test to be valid for a reasonable length of time and be used as proof that the applicant is free of illegal drugs.

USA suggests that what is truly needed to make sure that U.S.-flag vessels are drug-free would be for a rule to be promulgated that would allow shipping companies when they find out and discover instances of drug abuse, to be allowed to report their findings of substance abuse to the Coast Guard, who would be required to suspend or terminate the violator's Coast Guard documentation and thereby prevent him or her from sailing on any U.S.-flag vessel. Today, a finding of drug or alcohol abuse may prevent an employee from working with a company, but it does not prevent him from taking his addiction to another company. It is further recommended that the Coast Guard require drug testing in connection with the original issuance or renewal of documentation for seamen.

USA members are opposed to mandated random, periodic, reasonable cause and post-accident drug testing. Such tests should be at the option of management when deemed appropriate under certain circumstances. Random testing aboard vessels would create chaos. Who would do the testing? It must be remembered that a ship's crew is a small tightly built society with definite levels of authority. The very fabric of this needed structure would be fractured with subordinates taking and administering drug tests of their superior officers.

Post-accident testing is a law-enforcement function and such tests should be administered by the Coast Guard. One additional and serious concern about post-accident testing is that if it is done in a foreign port and the results are positive, it may well subject the individual to prosecution by local authorities and the vessel to seizure. In addition, since a foreign-flag vessel would not be subject to such testing of its crew, it would put the U.S.-flag vessel in an intolerable position concerning its future liability. Evidence of drug use, even if not the cause of an accident, would so color the proceedings that the U.S.-flag vessel would be almost certainly held to be liable.

While we oppose government-mandated random, periodic, reasonable cause and post-accident drug testing, we can and do support cooperative programs developed between companies and unions to require whatever testing specific circumstances may require.

The breadth of a rehabilitation program, if any, should be left to the employer's discretion. The merchant marine has a high percentage of casual or temporary labor. It is not unusual for thirty-forty percent of a ship's crew to sign on for one or two voyages of a few weeks duration and then leave and go with another company. For an employer to be burdened with the cost of rehabilitation of casual or temporary employees is unreasonable.

While USA members are against government-mandated testing, it should be noted that USA would support a Coast Guard rule within constitutional bounds that would give the Coast Guard the authority to administer the tests set forth in this proposed rule at its own expense.

One additional benefit of Coast Guard hearings would be that two conflicting lower court cases, which address drug testing programs are now before the U.S. Supreme Court for review and may be decided in the interim. Direct guidance from the Supreme Court would put us in a much better position to fashion either a regulation or a private program that would meet the constitutional tests. Prudence dictates that we wait to see the eventual findings of the Supreme Court and during the interim we hold fact-finding hearings and work together in a cooperative spirit.

Mr. Chairman, I would be pleased to answer any questions that you or members of the Subcommittee may ask.

STATEMENT OF JAMES H. SANBORN

EXECUTIVE VICE PRESIDENT, OPERATIONS

MARITRANS OPERATING PARTNERS L.P.

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Good morning Mr. Chairman and members of this Subcommittee. My name is James H. Sanborn and I am Executive Vice President for Operations of Maritrans, formerly Sonat Marine. Maritrans is the largest independent marine transporter of petroleum products in the United States. My company operates 37 tugs and 47 barges, principally on the Atlantic and Gulf Coasts. Five hundred of our almost 700 employees are employed directly on our vessels.

Mr. Chairman, I appreciate the opportunity to testify before you and the other members of this Subcommittee today. I am here to discuss Maritrans' concerns about the Coast Guard's proposed rulemaking regarding chemical drug and alcohol testing of commercial vessel personnel. Let me state at the outset that I, and the rest of the management at Maritrans, are vehemently opposed to illegal drug use and alcohol abuse. I believe we should do everything reasonable to combat the problem of drug and alcohol abuse wherever it exists. Maritrans is committed to advancing safety in marine operations and anything which affects the potential safety of our fellow employees, our vessels, and our customers' cargoes is an issue of utmost concern. However, THIS RULE IS NOT REASONABLE! This rule would impose on the marine industry an inflexible program of enormous magnitude, the cost of which has been significantly under-estimated, the constitutionality of which is in doubt, the need for which has not been demonstrated, and the efficacy of which is highly questionable.

Maritrans is not opposed to all types of drug testing. We do not oppose (1) pre-employment screening; (2) periodic drug testing in conjunction with regularly-scheduled physical examinations; (3) reasonable cause testing if employers are given very broad discretion on whether or not testing is necessary; and (4) post-casualty testing if conducted by appropriate governmental law enforcement officials. What we oppose is repetitive random testing and employer-conducted post-casualty testing imposed on private industry by the federal or any other government. These latter types of testing are unjustified, ineffectual and counter-productive. At best, they could subject Maritrans to unjustifiable costs and re-allocation of precious resources, the benefits of which have not been demonstrated. At worst, they will put us into a legal morass of incredible proportions.

1. The Coast Guard Lacks Any Data Which Indicates Wisespread Drug or Alcohol Abuse in the Merchant Marine

First, the Coast Guard has no evidence of widespread drug use among the employees to whom the proposed regulations would apply, namely marine vessel employees, which would justify the kind of massive intrusion and cost which the program would involve, and they acknowledge this situation.

We do not believe there is widespread use of illegal drugs in the marine industry, and in our company especially. We simply have not seen the behavior or had any experiences which would indicate a large problem. What we occasionally face among our employees are the side effects of the overuse of alcohol, and we have successfully dealt with that problem on a case-by-case basis when faced with it, with a program which has been in place for many years.

The Coast Guard made a critical initial assumption about the industry, an assumption which we think is fundamentally wrong. In the preamble to the proposed rule, the Coast Guard stated:

> "While the bulk of drug abuse occurs in the 25 and under categories and overall usage may drop as this group grows older, maturation cannot be considered a solution to the problem. The Department of Transportation in its regulatory role must operate under the assumption that the various transportation modes do not significantly differ from the overall population in terms of drug and alcohol abuse."

53 Fed. Reg. 25,926 (emphasis added). In other words, the Coast Guard assumed that because there is a drug problem in society, there is also a drug problem in the merchant marine. The Coast Guard provides some very limited data on the number of casualties and suspension or revocation proceedings involving alcohol and drugs in the period 1981-1986. Based on the above assumption, the Coast Guard then proposes a massive drug testing program while at the same time acknowledging that the data "are sparse and are not conclusive." Id. at 25,927. While we cannot speculate about the problems, if any, in other companies, we do not believe there is a widespread problem in our company.

The very nature of tug and barge operations would tend to identify drug abusers, especially in the supervisory positions. Our employees work closely together in small cohesive teams. If a drug abuse or alcohol abuse problem exists, it would surface quickly. Our employees are trained to be concerned about health and safety; their livelihood is dependent on both physical and mental fitness which are subject to frequent examination.

2. The Cost of the Program to Marine Employers is Excessive and Will Financially Burden the U.S. Merchant Marine

We believe the Coast Guard has significantly underestimated the cost of its proposed drug testing program -- a cost it seeks to impose on private marine employers trying to operate safely, efficiently, and hopefully profitably. The Coast Guard has estimated that the first-year cost of the program alone will exceed $62 million. To arrive partly at this figure, the Coast Guard has estimated that the costs for pre-employment, reasonable cause and random sampling tests will be $15 for initial tests and $25 for confirmatory tests. 53 Fed. Reg. 25,940-941. However, at a June 2, 1988 hearing on a similar rulemaking proposed by the Federal Aviation Administration -- Antidrug Program for Personnel Engaged in Specific Aviation Activities, Docket No. 25148 -- published in the Federal Register on March 14, 1988 (53 Fed. Reg. 8368), Rear Admiral Thomas T. Matteson of the Coast Guard testified that the laboratory costs alone of the Coast Guard's own drug testing program are $21 per test. First of all, this is a rock-bottom price, far below what most laboratories charge. But more importantly, it is higher than what the Coast Guard, in the proposal, estimates initial screening tests could cost on a volume contract basis: $15.00 per test. 53 Fed. Reg. 25,940-941. Moreover, administrative costs are estimated for some types of testing, but not for others.

Because the test samples must be sent to HHS-certified laboratories, we can expect the costs of the tests to be significantly higher. In our experience, the cost of complying with governmental certification requirements for any product is a large factor in the price of that product. Currently, our investigation reveals that there are no HHS-certified laboratories in existence. If any laboratories do become certified, we can expect the cost of their services to rise in accordance with the cost of becoming certified. We have learned that many laboratories are simply not interested in becoming certified because of liability and chain of custody concerns.

I would like to make one last point about cost. Much of our operating structure is already dictated by governmental regulation. While the tug and barge industry is a very efficient and competitive industry, operating without subsidy, the cost of complying with the Coast Guard's proposal will impose a tremendous financial burden on the industry unjustified by the need for the program. For those segments of the industry competing against foreign interests, this program could place them at a distinct financial disadvantage vis-a-vis those foreign interests.

3. The Constitutionality of Government-Mandated Drug Testing Programs is in Doubt

There are now two cases pending in the U.S. Supreme Court scheduled to be heard on November 2, 1988, that will substantially clarify and hopefully settle the issue of whether government-mandated drug testing is permissible under the Fourth Amendment of the United States Constitution. We see no reason why the Coast Guard cannot defer action on this proposal until those two cases are decided by the highest court of the land. Why require the marine industry to undertake a massive drug testing program at substantial cost only to face the possibility very shortly that the entire program is ruled impermissible under the Constitution? From the standpoint of government accountability, this is ludicrous!

4. The Proposal Improperly Shifts Law Enforcement Responsibilities to Private Marine Employers

I have some specific concerns about the Coast Guard's proposal for post-casualty testing, on which I'd like to elaborate. The Coast Guard has proposed that the private sector accept the burden and responsibility for conducting drug tests on vessel personnel after a "serious marine incident." First of all, the definition of "serious marine incident" is so broad as to encompass almost any incident involving more than a simple cut finger. But more importantly, the post-casualty testing proposal constitutes an improper transfer of governmental law enforcement responsibilities to the private sector. The Coast Guard directs that a marine employer first determine in good faith when a "serious marine incident" has taken place. If such an incident has taken place, the Coast

Guard proposes that the marine employer then test every person "directly involved" in the incident - meaning, a person:

> "who supervises, performs assigned duties in connection with, or otherwise actively participates in, any commercial vessel operation or any activity occurring aboard a commercial vessel which is a substantial factor in the events leading to the casualty or serious marine incident."

53 Fed. Reg. 25,935. In many cases, the supervisor on a vessel would have to be tested and would also be responsible for determining who else on the vessel should be tested. The marine employer must also determine whether a sample can be safely or reasonably obtained.

These requirements would place the marine employer in the untenable role of a surrogate law enforcement official for the Coast Guard. We are not law enforcement officers. Our relationship with our employees is that of an employment relationship, not a law enforcement relationship.

The Coast Guard is proposing a gross misallocation of resources which can set back safe operations in our industry light years. Our company has expended millions of dollars and untold man hours on safety and training programs designed to continually improve our mariners' professional competence. As it is, given geographic dispersion and the very nature of our seagoing operations, it is a challenge to get most of our people through annual training programs. Time and years of experience have proved that our operations have improved in safety as well as operational efficiency. To accomplish our seagoing supervision by way of training in drug testing and post-casualty drug abuse investigations will greatly diminish our ability to conduct both professional and safety training.

Consider what the Coast Guard demands: that our supervisors be trained to take blood samples, urine samples, ensure proper custody, and on and on. Like any other skill, these must be practiced to be retained, and retraining will be necessary when not used. This will be an on-going industry-wide training expense which diverts precious dollars and personnel resources from programs proven to reduce maritime accidents and increase productivity. When we consider that the Coast Guard has schools for training marine casualty inspectors, and that they have post-accident professional investigators throughout the country, I am led to conclude that this proposition is the biggest and most dangerous misallocation of resources mandated by any federal agency.

We have been told that the reason the Coast Guard has taken this approach is because it lacks the necessary funds to implement a post-casualty testing program on its own. If the goals of the Coast Guard's testing program are so important, then the Coast Guard should come to Congress to get the funds it needs to properly implement a post-casualty testing program, rather than pawning off law enforcement functions on the private sector.

5. The Validity of Drug Test Results is Questionable

The proposed rule is an attempt to free the entire marine industry from both drug users and drug abusers. It is widely recognized that such a testing program often yields test results that would be inherently untrustworthy and frequently wrong. It could fail to detect drug abusers while at the same time falsely accuse many innocent employees. It is intrusive and will only humiliate our employees, employees who are highly trained, responsible, and dedicated individuals, who probably have never used drugs.

It is well-known that when drug tests are administered among a population with only a small percentage of drug users, the number of false positive test results will equal or exceed the number of true positives. And while the HHS Guidelines require that every positive result produced by an initial screening be confirmed by a more accurate gas chromatography/ mass spectometry test, this will not eliminate false positives and the resultant negative perception of an employee who tested positive.

Not only may an employee testing false positive be harmed for life, but the employer who directed the taking of the test could be subject to liability for the falsity of the test and the resultant harm to the employee's reputation.

6. The Proposal is not Flexible and is not Tailored to the Diverse Needs of the Marine Industry

Maritrans recognizes the need for a rehabilitation program of some type to deal with those employees who have a drug or alcohol problem and need help to overcome the problem. Regretfully, we believe that the Coast Guard's approach to drug abuse is wrong. The random, periodic, reasonable cause, and post-casualty testing proposals may detect the use of drugs, but they will be ineffectual in preventing the use of drugs. Pre-employment screening will only weed out those persons who already use drugs. We believe the best, less-intrusive approach is one which we have adopted at the present time in our company to combat these problems. Our program is one of education and training, peer involvement, confrontation, and counseling or rehabilitation, designed to work on an individualized, case-by-case basis depending on the circumstances of any one employee. So far, our program has been successful.

Our supervisors have to be on the look-out for signs of both drug abuse and alcohol abuse to assure the safety and performance of their crews. The Coast Guard, in the preamble to the proposed rule, states that "few people (including fellow crewmembers) are trained in how to detect drug or alcohol abuse." 53 Fed. Reg. at 25,297. Upon what evidence they relied in making this determination is unknown. We know they did not ask us about our program.

We have a far greater exposure to our employees on a day-to-day basis than what a large bureaucratic federal agency could ever hope to gain. Our employees are not automatons who go to an office each day with relatively little interaction with top management. We see our employees frequently. We know their families. We know their background. We can tell whether they are having any problems -- either at home or at work. And we are involved with them as soon as we sense any type of problem. It may not be perfect but we would not run our company in any other way. The nature of our operations demands it. I do not believe I need to remind the members of this Subcommittee of the implications and ramifications for both Maritrans and the public of an oil or petroleum product spill.

A flexible drug and alcohol program, designed for each company's disparate needs, will promote the Coast Guard's goal of deterrence, but will also respect the employer's need for cost efficiency and the employee's right to negotiate in collective bargaining and participate in a program having a profound impact on his/her professional and personal life. This will lead to greater harmony among management, the unions, and the employees, rather than a program which is imposed by federal fiat and which would create friction between employers and their employees.

Mr. Chairman, the Coast Guard's effort to eliminate an assumed drug and alcohol problem in the marine industry, while laudable, raises many important fundamental concerns -- legal, practical, and economic -- for the entire marine industry. I have with me our comments on the Coast Guard's rulemaking docket which are more extensive than my comments today. I would like to submit them for the record as an attachment to my statement today.

Maritrans believes that more time is needed to evaluate this complex and extensive proposal and to develop an approach that is legally defensible, as well as one that is workable and acceptable to the marine industry. Thank you for giving me the opportunity to appear before you today.

COMMENTS

OF

MARITRANS OPERATING PARTNERS L.P.

ON

NOTICE OF PROPOSED RULEMAKING

PROGRAMS FOR CHEMICAL DRUG AND ALCOHOL TESTING OF COMMERCIAL VESSEL PERSONNEL

[CGD 86-067]

September 6, 1988

(Attachment to the prepared statement of James H. Sanborn, Executive Vice President, Operations, Maritrans Operating Partners L.P., before the Subcommittee on Merchant Marine, 22 September 1988)

COMMENTS OF
MARITRANS OPERATING PARTNERS L.P.

I. Introduction

These comments are submitted by Maritrans Operating Partners L.P. ("Maritrans") in response to the Notice of Proposed Rulemaking ("NPRM") captioned "Programs for Chemical, Drug and Alcohol Testing of Commercial Vessel Personnel" (CGD 86-067). 53 Fed. Reg. 25,926 (July 8, 1988). Maritrans is the largest independent marine transporter of petroleum products in the United States. Headquartered in Philadelphia, Pennsylvania, the company operates a fleet of 37 tugs and 47 barges, principally on the Atlantic and Gulf Coasts. We currently employ 690 individuals, 500 of which are employed directly on our vessels. While our barges are typically unmanned and range in size from 3000 tons to 37,500 tons, most of our towing vessels measure under 200 gross tons, and are certificated for the coastwise service. Our tug-barge units typically carry a crew of approximately 8. Our deck officers hold licenses as operators of uninspected towing vessels or of a superior grade. Additional personnel are either licensed as engineers, or certificated as tankermen or able-bodied seamen. Our assistant engineers and unlicensed personnel are members of labor unions and work under the terms of collective bargaining agreements.

Maritrans has long been committed to a comprehensive program of marine safety training and awareness. An integral part of this program is a drug and alcohol training, education, and rehabilitation program that is designed to prevent employees with alcohol or substance abuse problems from working onboard our vessels. Maritrans does not believe that it has a real problem with substance abuse aboard its vessels. Presently, Maritrans focuses on individual problems of apparent off-duty alcohol use which manifest themselves in health-related ways, and tailors its responses in these relatively few instances to each individual case. For example, some such cases call for more or less extensive use of counseling and/or rehabilitation (which is totally discretionary), while in others disciplinary action is involved. Maritrans believes its favorable experience is due primarily to its stable seagoing workforce, its many longtime employees and its knowledge of its workforce. Therefore, Maritrans strongly urges that the final rule provide maximum flexibility to the vessel operator/employer to fashion its own particular drug/alcohol program.

Maritrans has been supportive of the Coast Guard's recent efforts to amend its regulations to provide for more effective disciplinary procedures for marine personnel who use or abuse alcohol and illegal drugs. We find that the past efforts of the Coast Guard have complemented efforts to prevent alcohol and drug abuse in our company. However, in the present rule-making, the laudable goals do not justify many of the mandated means. The proposal appears based on the unfounded assumption that drug and alcohol abuse is rampant in the U.S. merchant marine. Through its overzealousness to quash this perceived problem, the Coast Guard has fashioned a proposed rule that will result in the employer playing policeman to its employees by conducting drug testing on a widescale basis. This is regulatory overkill at its finest.

The NPRM contemplates five types of employee testing to detect drug and alcohol abuse: pre-employment screening, periodic testing in conjunction with required physical examinations, random testing for all marine employees serving aboard vessels (and possibly all shoreside personnel), reasonable cause testing, and post-casualty testing. The NPRM also contains four options for employee rehabilitation programs for employees testing positive for drug usage, ranging from mandatory rehabilitation for all employees with positive test results to discretionary, flexible rehabilitation fashioned by the needs of each individual employer.

Maritrans strongly supports the Coast Guard's proposal to require pre-employment testing for regular crew members and periodic testing in connection with license renewals and annual physicals. Such programs discourage drug users at the outset from applying for marine jobs, and the periodic testing will have a substantial deterrent effect.

While we support the objectives of the NPRM, we generally believe that many of the features of the proposed rule which relate to random testing are unworkable, and may interfere with existing effective, on-going programs and will place our company in conflict with other legal obligations. The same objectives could be achieved if the Coast Guard modifies the proposed rule to provide the marine employer far more flexibility in carrying out screening, testing, and rehabilitation programs and if the Coast Guard is given full responsibility for accident investigations rather than trying to improperly delegate these responsibilities to the private sector. The comments which follow are divided into general comments and specific comments on individual provisions.

II. General Comments

A. The Rule is Based on Inadequate Information and Limited Understanding of its Consequences

Maritrans is deeply concerned about this rush to issue a Final Rule before the end of the year. While the issues relating to pre-employment and periodic testing are relatively straight-forward, the proposal for random testing and post-casualty testing involves far-reaching practical and legal consequences. There is an alarming lack of factual foundation for the proposed rule and uncertainty about the practical problems associated with its implementation. As the preamble states, "it is acknowledged that the above data are sparse and are not conclusive." Id. at 25,927. However, from that admitted limited database, the agency has chosen to adopt a sweeping proposal going well beyond existing screening for drugs used by many employers which subjects all seagoing personnel to repeated random drug testing. Indeed, the Coast Guard's purpose in proposing such a major program is to "collect data as to the extent of substance abuse" and to "plan future action." Id. at 25,928. In our view, this is a total abdication of the Coast Guard's responsibility to investigate the need and justification for such a comprehensive program before initiating the process to mandate it. Furthermore, the NPRM would improperly impose on marine employers law enforcement obligations, as well as substantial costs, both of which properly rest with the U.S. Government.

The Coast Guard must first determine whether the dimensions of the problem justify such a sweeping, complex and expensive proposal. A rulemaking of this magnitude must be predicated on a rational assessment of the extent of the problem in the marine industry, including the various segments thereof. The rule is based on an extrapolation from limited, often secondary, information relating to the overall population at large, not actual statistics from the marine industry. From Maritrans' perspective, it is a very limited problem which we are successfully handling with existing procedures.

At the very least, the agency should conduct surveys to determine whether the seagoing population has a demonstrable drug abuse and alcohol abuse problem, and fashion remedies which take into account different operations and other marine employer characteristics. We, for example, have never been asked by the Coast Guard to provide such information. Other employers who have programs would undoubtedly provide information if it were kept on a confidential, aggregated basis. This is far preferable to simply speculating about the problem and making sweeping assumptions without further investigation.

In addition to the lack of factual background about the dimensions of the drug and alcohol abuse problem in the maritime industry, the agency has little information about the practical effect of the sweeping testing program it is proposing. For example, the Coast Guard asks a series of questions about the random testing program, including some fundamental questions about cost. Id. at 25,931. Rather than imposing random testing and asking about costs after the fact, the Coast Guard should first determine the cost of these programs and determine whether they are workable and cost-effective.

In addition, the subject of insurance coverage and its availability for employer liability resulting from drug testing programs has not been addressed. Maritrans has looked into the coverage issue, and some examples of our concerns are the following:

1. Under an employer's general liability policy, is there coverage for actions involving the employer's drug testing program?

2. Is an employer covered when an employee sues the company for violation of civil rights?

3. If the Coast Guard finds a technical violation in the structure of an employer's drug testing program, can this affect the employer's insurance coverage if a later casualty is found to involve drug use?

We do not know the answers to these problems, but we believe the issue should be addressed before a Final Rule is issued.

This proposal raises many questions about the proper implementation of a national drug testing program for the marine industry. It appears that not enough time has been devoted to defining a program which is workable and effective for the marine industry, and which satisfies constitutional and individual privacy concerns. By asking a series of basic questions about this whole subject area, it suggests to the public and the industry that the Coast Guard does not have a firm proposal in mind and is going to design its Final Rule in large measure based on the responses received from the public during the limited comment period.

This notice should have been issued as an Advance Notice of Proposed Rulemaking (ANPRM). The Coast Guard Procedures Guide for Operations of the Marine Safety Council confirms this:

> The Department of Transportation encourages the use of the ANPRM. These are generally used when we are interested in regulating in a certain area but need more information about what form the regulation should take, the actual need for regulation, and the cost of the proposal or other general types of information.

U.S. Department of Transportation, U.S. Coast Guard, Procedures Guide for Operations of the Marine Safety Council, May 1986, at 32-33. The agency can correct this glaring procedural deficiency by issuing a Supplemental Notice of Proposed Rulemaking which is:

> useful when the original proposal [is] modified to reflect the evaluation of the comments . . . an SNPRM would be required if the proposal were to be substantively changed to include provisions not contemplated in the original NPRM.

Id. at 35. We strongly recommend that the Coast Guard issue such a Supplemental Notice of Proposed Rulemaking after adequate consideration of all comments received on this proposal.

B. The Proposed Rule Ignores the Impact on Employers of Conflicting Legal Obligations

Maritrans has a compelling interest in having a substance-free work environment. It is good business and responsible corporate conduct. We recognize the deterrent effect of pre-employment testing and periodic testing. Our enthusiasm to prevent drug and alcohol abuse through random testing and post casualty testing, however, is tempered by some of the well-founded criticisms of, and legal challenges to, such offensive drug-testing programs. Any drug testing program is intrusive, particularly random testing. Such testing invades an employee's privacy; moreover, testing methods are not foolproof and can yield false results. Testing can also create friction between employers and employees and their union representatives.

There is substantial legal controversy because of these objections and, consequently, employers conducting testing programs need to do so with great care. Our major objection to the NPRM is that the Coast Guard would blindly impose random testing obligations which could subject the marine employer to liability for violations of other important legal obligations. We believe we can tailor a program to our company that will prevent use of drugs and alcohol by sea-going personnel. It can best be achieved without the strictures of this rule which are likely to provoke legal challenges and could subject our company to liability.

The proposed regulations present serious problems with at least three areas of substantive law: (1) Fourth Amendment search and seizure law; (2) the law of collective bargaining grounded in the National Labor Relations Act; and (3) the laws in many states dealing with invasion of privacy. Based on principles present in these bodies of law, the regulations, if adopted, could be enjoined and the employers charged with implementing them could be subject to liability under both state and federal laws. This is clearly an unacceptable result!

1. Fourth Amendment Search and Seizure Considerations

In a recent case, the United States Court of Appeals for the Ninth Circuit held to be unconstitutional under the Fourth Amendment to the U.S. Constitution regulations that were analogous, in every relevant respect, to those dealing with the post-casualty and reasonable cause testing that would apply to marine employers should the proposed rule be adopted. In Railway Labor Executives' Association v. Burnley, 839 F.2d 575 (9th Cir. 1988), the court was presented with a set of regulations that required railways to subject their employees to blood and urine tests after certain specified types of accidents and on a "for cause" basis. In that case, as here, the regulation mandating the testing had been promulgated by a government agency and it required private employers to conduct the testing. The court first concluded that the government's extensive participation in the "course of conduct leading to [the] search" satisfied the requirement for state action and that, although railroads had traditionally been a pervasively regulated industry, that did not justify the intrusive, warrantless search of the rail employees represented by the testing program. Id. at 581, 584-85.

The court then proceeded to apply a traditional Fourth Amendment analysis to the regulations. It held that the occurrence of the events that triggered the post-accident testing did not provide the "reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment" necessary to permit the searches. Id. at 587. It further held that the testing for drug metabolites was not sufficiently related to the stated purpose for the testing -- the prevention of harm caused by drug-impaired railroad employees -- to justify either the post-accident or the "for cause" testing.

Id. at 588. Finally, the court held that the implied consent section of the regulation, nearly identical to that in the proposed regulation applicable to marine employers, did not permit the intrusive testing: "when a search has been determined to be constitutionally unreasonable, the consent feature cannot save it." Id. at 589.

The portion of the proposed regulation providing for random testing of all employees serving onboard covered vessels is equally flawed. In evaluating programs providing for drug testing, courts have repeatedly refused to sanction the intrusion of blood or urine testing unless it was predicated upon a reasonable degree of individualized suspicion. This has held true irrespective of the sensitive or dangerous nature of the employees' occupation and the resultant danger that would be posed to the public should the employees be impaired by drug use. Firefighters, police officers, and bus drivers have all been held to be entitled to the protection afforded by the standard requiring a reasonable quantum of individualized suspicion before mandatory testing may be performed. See Amalgamated Transit Union Local 1277 v. Sunline Transit Agency, 663 F. Supp. 1560, 1568 (C.D. Cal. 1987) (bus drivers); Feliciano v. City of Cleveland, 661 F. Supp. 578, 589 (N.D. Ohio 1987) (police officers); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986) (firefighters). Drug impairment by individuals involved in any of these professions would clearly pose a comparable threat to members of the public to that of marine employees; however, even that threat has been held insufficient to justify random testing. Since it has been held to be unconstitutional in even these contexts, it is most likely that a court following this precedent would find the post-accident testing rules unconstitutional in the case of marine employees.

2. Labor Law Considerations

Mandatory drug testing programs are also certain to implicate aspects of the National Labor Relations Act. 29 U.S.C. § 151 *et seq*. Section 8(d) of the Act requires employers and the representatives of their employees to meet and bargain in good faith over "wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d). Any aspect of the relationship between employers and employees that falls within the ambit of this phrase constitutes a mandatory subject of bargaining. Although employer-imposed drug testing regimes have not yet been held to be a term or condition of employment under the National Labor Relations Act, many commentators believe that drug testing is a mandatory subject of bargaining. *See* NLRB General Counsel Opinion 87-5, "Guideline Memorandum Concerning Drug or Alcohol Testing of Employees," (Sept. 8, 1987) (stating that drug testing is a mandatory subject of collective bargaining). Lending support to this view is a recent Ninth Circuit case in which the court, when presented with an analogous issue under the RLA, held that an employer was required to bargain over the implementation of a drug testing program. In Brotherhood of Locomotive Engineers v. Burlington N. R.R. Co., 838 F.2d 1087 (9th Cir. 1988), the court held that, a testing program similar to that in the proposed regulation was a "mandatory subject of bargaining under the RLA and [could] not be implemented unilaterally." Id. at 1090. There is no question that a similar result would be reached if a court were to consider such a program under the NLRA.

The proposed regulation would thus place unionized marine employers in the untenable position of being certain to violate either a Coast Guard regulation or the provisions of the NLRA. These violations of the NLRA would, in turn, expose employers to suits in which the courts could enjoin the continued operation of the testing programs. Here, the laudable goal of deterring drug use among the merchant marine collides with the equally venerable policy of encouraging collective bargaining as a means of promoting industrial peace and prosperity. The result is the direct conflict of the proposed regulation with an act of Congress.

3. State and Local Privacy Law Considerations

Finally, the actions required by the regulation would force the marine employer to violate the privacy right that many employees possess under state laws. At least ten states guarantee their citizens a right of privacy in the state constitution. This right appears in the constitutions of Alaska, Arizona, California, Florida, Hawaii, Louisiana, Illinois, Montana, Massachusetts, and Rhode Island. Other states have adopted the violation of an individual's privacy as a tort. See, e.g., Pemberton v. Bethlehem Steel Corp., 66 Md. App. 133, 502 A.2d 1101, cert. denied, 306 Md. 289, 508 A.2d 488 (1986); Harker v. Abate, 131 Mich. App. 177, 346 N.W.2d 74 (1983); K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. 1985). To qualify as an invasion of privacy, an intrusion must generally be something which would be offensive or objectionable to a reasonable person. Given the activities that have been held to constitute an invasion of privacy, however, the intrusion attending mandatory drug testing of any sort would most likely qualify. See, e.g., La Crone v. Ohio Bell Tel. Co., 114 Ohio App. 299, 182 N.E.2d 15 (1961) (interception of private telephone conversations); Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959)(search of a shopping bag in a store); Young v. Western & A.R. Co., 39 Ga. App. 761, 148 S.E. 414 (1929).

The proposed rule should at most encourage employers to establish their own programs of training, testing, and rehabilitation but allow the employer to design the program so as to avoid violation of the labor laws and individual liberties guaranteed by Federal and State law.

C. The Rule Would Impose Enforcement Obligations on Marine Employers Which Should Properly Be Retained by the Coast Guard

Maritrans vehemently objects to post-casualty testing requirements which compel marine employers to become surrogate investigators for the Coast Guard. The concept is repugnant to our legal system, and reflection into the practical effects of these requirements should manifest the practical and legal flaws.

The problems start with the requirement that the operating personnel on the vessel and then the marine employer are primarily responsible for making a "timely, good faith determination" as to whether there has been a "serious marine incident" -- the event which triggers employer mandatory drug and alcohol testing. We predict that this required law enforcement-type judgment is going to become a source of considerable controversy between industry and the Coast Guard. We and our operating personnel are not investigating officers, and it is not our expertise to determine whether an event-triggering incident has occurred. This is the proper job of law enforcement personnel, who receive extensive training for making such determinations.

We foresee many problems in the future where we will be challenged by the Coast Guard as to why we did not report an incident as a "serious marine incident" and why drug testing and alcohol testing were not performed. This is a highly subjective area and definitions of what constitutes a "serious marine incident," as will be discussed below, are fraught with uncertainty. Since every district office is likely to have a different view as to what constitutes a "serious marine incident," the marine employer will be second-guessed by those who have the benefit of 20/20 hindsight. Government enforcement agents have the legal responsibility for determining when incidents have occurred that pose investigation requirements. This has historically been a non-reviewable, discretionary govermental function. The marine employer, on the other hand, will be subject to review and second-guessing and possible sanctions under 46 U.S.C. §§ 6103 or 7703 in exercising this delegated function. Moreover, unlike the Government, we cannot invoke sovereign immunity for our actions.

These problems are further compounded because under the NPRM the marine employer would be required to order crew members after a casualty to take drug and alcohol tests and to assume authority over testing personnel. We are not law enforcement personnel and do not have the authority to perform law enforcement functions. Our relationship with our employees is an employment relationship, not a law enforcement relationship. Likewise, how can hospital and other employees who have an obligation to protect the integrity of testing procedures be expected to obey the instructions we would be required to give under the NPRM, especially since the marine employer may actually be the party of interest?

When objections were raised in a prior rulemaking on marine casualty investigations [CGD 84-099, 52 Fed. Reg. 47,526, 47,530 (Dec. 14, 1987)] to employers making determinations of drug or alcohol involvement in reportable marine casualties, the Coast Guard "recognized that the ultimate responsibility to determine whether an individual used alcohol or drugs, or was intoxicated, most appropriately rests with the person who is authorized to impose sanctions or penalties for such conduct." Marine employers cannot be expected to order people to take actions in the context of investigations when they lack the statutory authority to do so. That authority is vested by statute in governmental authorities. It would be unprecedented, for example, in the trucking industry, for an employer to go to the scene of an accident and under color of legal authority make a determination as to whether alcohol testing was required and then order his employee(s) to undergo drug tests and assume responsibility for the processing of test results.

This rule seems to take the view that because of perceived practical impediments to immediate onsite testing by Coast Guard officials, the marine employer is administratively "deputized" to perform these functions--a deputy relationship which is in actuality adversarial to the Coast Guard (bearing in mind that this is a rule which contemplates administrative fines and sanctions against marine employers for noncompliance with the proposed rule). This is absurd. Just because our vessels often are offshore, that does not mean that the legal relationship between the Coast Guard as a law enforcement agency and the regulated community is any different. The Coast Guard should revise its rule to recognize its proper role as the agency which determines whether "a serious marine incident" has occurred and as the agency which is responsible for the gathering of evidence in conducting marine investigations. The rule improperly attempts to delegate these functions to the private sector; this ludicrous approach should be rejected.

III. Section-by-Section Comments

Maritrans' comments on both the general and specific sections dealing with post-casualty testing relate solely to instances when the Coast Guard should conduct post-casualty testing.

Section 4.03-2

This section defines the term "serious marine incident" for the purposes of determining when the post-accident drug testing, mandated elsewhere in the regulation, must be conducted. In doing so, it states that such an incident will be deemed to have taken place whenever property damage in excess of $100,000 has occurred or when an injury has been sustained which "requires professional medical treatment beyond first aid, and in the case of a person employed aboard a commercial vessel, which renders the crewmember unfit to perform routine or emergency vessel duties." This definition is impracticably broad, and thus, totally unworkable. The practical effort of this definition is that testing would have to be conducted even after incidents that clearly had no connection with drug use by a marine employee. For example, a mechanical failure such as the rupture of a cargo transfer hose leading to a reportable spill could trigger testing. Equipment failures or weather-related casualties would trigger the testing requirements. The overreaching of this section would be avoided by changing § 4.03-2(a) to read: "Any marine casualty is defined in § 4.03-1 of this part which results in any of the following _when it is caused by human error of one or more of those on the vessel_."

This section should also provide that an occurrence which would otherwise qualify as an "incident" is not reportable if the events leave no doubt that drug abuse played no part in the accident. The regulation also encompasses relatively minor injuries that surely do not warrant the total disruption of marine operations represented by the proposed testing program. Any minor slip-and-fall incident in which a crewmember broke a bone would qualify as a "serious marine incident" since it would require more than "first aid care" and could render him unfit for emergency duty. A more practical approach to defining an injury for this purpose is that present in the regulations proposed by the Federal Highway Administration for motor carriers. These proposed regulations would define an incident requiring drug testing as one involving the death of a human being within 24 hours after the occurrence. See Motor Carrier Safety Standards; Controlled Substances [FHWA Docket No. MC-116] (53 Fed. Reg. 22,268; June 14, 1988). By adopting a more limited definition of injury, drug testing would be required only in situations which warrant it.

Section 4.03-4

This section dictates who must be tested for drugs once a qualifying incident has been determined to have occurred. It also would lead to an overinclusive testing program as it is now written, by requiring the testing of any "person who supervises, performs assigned duties in connection with, or otherwise actively participates in, any vessel operation or any activity occurring aboard a vessel which is a significant factor in the events leading to or causing a casualty or serious marine incident." The application of the standard as it is written could lead to testing measures that went well beyond the scope of any drug problem that could conceivably have contributed to the accident. A more workable standard is found in the proposed rule promulgated by the FAA. It would require the testing of any employee whose "performance either contributed to an accident or can not be completely discounted as a contributing factor to the accident." Appendix I to Proposed Rule for Airlines. 53 Fed. Reg. 8386 (Mar. 14, 1988). This would allow for the exclusion from testing of any personnel whose performance was clearly not a factor in any accident but who nonetheless would be required to undergo testing under the NPRM, which seems to favor testing everyone in sight!

Section 4.05-1

This section suffers from the same overbroad definition of injury discussed in connection with section 4.03-2 and should be conformed to the language suggested above.

Section 4.06-1

As presently written, subsection 2 of this section dictates that, once an incident is determined to have occurred, the "involved" individuals must be transported "when practicable" to a medical facility or that medical personnel must be transported to the vessel for the purpose of obtaining blood and urine samples. This is a burdensome responsibility on the marine employer which is totally unworkable, and, it will lead to significant expenses and possibly danger, for instance, by using helicopters to transport crew members to medical facilities (and most probably to fly in a replacement crew). Use of helicopters in adverse weather and operating conditions could lead to loss of life. There is no limit on what expense and effort is expected of the marine employer. The sky is the limit! Again, all this would be carried out on the basis of a regulatory "suspicion" that drug use was presumptively involved in a casualty. We strenuously object to being forced by the political hysteria underlying this rule to engage in these types of "Keystone-Kop" exercises which will be expensive and may even be dangerous -- where there may not be one scintilla of evidence based on past and present circumstances that drug use was a factor.

The burden of this section would be significantly lessened by replacing "when practicable" with a more concrete and reasonable standard. One standard that would accomplish this end would require transportation to accomplish drug testing solely when the employer would otherwise have deemed it necessary to bring medical personnel to the scene of an accident. This would reduce the danger and needless expense to which an employer would be put by the regulations while, at the same time, providing for testing when the situation was serious enough to arguably warrant it. Whether this standard or some other is adopted, marine employers will need some more objective guideline than the vague, shifting notion of "practicability" in deciding whether to undertake transportation to accomplish drug testing.

Subsection 4 of this section requires that the marine employer "ensure that all employees serving aboard vessels are fully indoctrinated in the requirements of this subpart and that appropriate licensed vessel personnel are trained as necessary in the practical applications of these requirements." The requirements of this subpart are often vague and the marine employer has little guidance as to what the "practical applications" of these regulations will be.

From the regulation it is unclear what the employees are to be trained for or indoctrinated in. This subsection should simply require that the contents of the subpart should be periodically presented to the employees in written form. This would clarify the responsibilities of the employers and thereby facilitate compliance with the regulation without confusion.

The last sentence of section 4.06-1(A)(2) [sic] recognizes the conflicting obligations of marine personnel in emergency situations. The rule should also recognize the need for marine personnel to perform the paramount duties of safe navigation of the vessel. On small vessels such as tug boats with few crewmembers, there should be explicit recognition that all personnel on board are vital to its safe navigation, unlike ships which typically have larger crews with three watches. The routine operation of the vessel requires the attention of all crew members, not just emergency operation. Surely the Coast Guard must recognize this well-established principle.

Section 4.06-10

Throughout this section, the proposed regulation attempts to improperly shift what are essentially law enforcement responsibilities surrounding the testing program to the employers. These responsibilities should lie with the Coast Guard and are not properly exercised by a private employer. If the Coast Guard lacks the funds, it should go to Congress to get the funds. This important governmental function should not be pawned off on private industry.

Subsection (b) requires the employer to ensure that hospitals comply with the collection procedures in the Code of Federal Regulations. This is unrealistic, impractical and unworkable. Subsection (e) requires the employer to ensure the prompt shipping of samples from the hospitals in which they are collected; and subsection (f) requires the employer to request the medical facility to obtain a sample and to notify the Coast Guard if the facility refuses to do so. These are all clearly functions connected with the execution of a government-mandated program and they should be borne by the agency requiring the program. It is manifestly improper for private employers to attempt to exercise control over a health care facility and testing procedures as this section attempts to do. We would expect testing entities to resist any type of supervision from the marine employer since we clearly have an interest in the outcome of testing results. This is exclusively a police function and, as such, it must remain with the proper authority -- the Coast Guard.

Section 4.06-15

This section, which requires the use of an evidential breath testing device (EBT), applies only to inspected vessels certificated for unrestricted ocean routes or a restricted overseas route. Maritrans is supportive of the distinction the Coast Guard is attempting to make by identifying only those inspected ocean-going vessels that are making voyages far offshore. However, our unmanned barges are inspected and would seemingly fall within the scope of this provision even though our uninspected tugs would not. It should be made clear that this section and its related sections do not apply to inspected, unmanned barges and, therefore, would not affect a tug-barge unit where the tug was uninspected. This section should, therefore, be changed so that its limitation with respect to such tug-barge units is clear.

Section 4.06-20

This section deals with the collection of urine samples by the employer. By the terms of section 4.06-1 of the proposed regulation, this is a task which will only be performed by employers operating inspected vessels on unrestricted ocean routes or a restricted overseas route. For this reason, the procedures dictated by this section apply only to those limited inspected vessels. This is not clear in the section as written, and as with section 4.06-15, the limitation that this section does not apply to unmanned, inspected vessels should likewise be made explicit.

The provision that an employee consents to the sampling of his remains for drugs in the event of his death would surely intrude on the jurisdiction of the coroner or medical examiner in the locality in which the death occurred, as well as presenting serious questions about the treatment of bodily remains. The requirements of this subsection would have no deterrent effect on drug use since the potential user would have died by the time the tests were to be carried out. This invasion can not be justified by the need for deterrence which underlies most of these proposed regulations. Its only purpose would be to provide data on drug use and this is surely not a sufficiently important goal to justify this sort of intrusive procedure.

Section 16.110

As mentioned above, the inclusion of an implied consent provision cannot save an otherwise unreasonable, unconstitutional drug testing program. Indeed, as one court has expressed it, "advance consent to future unreasonable searches is not a reasonable condition of employment." McDonnell v. Hunter, 612 F. Supp. 1122, 1131 (D. Iowa 1985). Therefore, this provision should be deleted until the constitutionality of drug testing programs has been decided by the U.S. Supreme Court.

Section 16.205(a) and (b)

Of all the testing requirements, those in these sections are the most useful and pose the fewest legal and employee relations problems. We understand pre-employment screening has, in many instances, prevented drug abusers from entering new marine positions. We support this section. We recognize, however, in certain sectors of the industry where there is extensive use of temporary or day workers that this requirement could be difficult to implement, particularly with unlicensed or undocumented individuals. Provisions for these types of hires should be included in the final rule. We are similarly supportive of periodic testing conducted in connection with required physicals. Our support for this type of testing must be qualified, however, by the observation that the unilateral implementation of periodic testing -- even when done in compliance with a government regulation -- would likely open the employer to suit by its unionized employees' representative for the failure to bargain over a mandatory bargaining subject.

Section 16.205(e)

This section would require that two of an employee's supervisors agree that he exhibited signs of drug use or alcohol impairment before he could be tested under the reasonable cause portion of the testing program. However laudable, this requirement is inappropriate for vessels with small crews since it will frequently be impossible for these employers to have two supervisors who are in a position to form an opinion on an employee's possible drug use.

A preferable approach would be to provide for testing when there is "reasonable cause" for it without attempting to delimit the manner in which the employer may arrive at the decision that reasonable cause exists. The employer should be given broad discretion in the timing of "reasonable cause" testing.

Section 16-210

As discussed above, the random testing mandated in this section raises serious questions under the Fourth Amendment of the United States Constitution as well as under federal and state law. Because of these problems and the difficulty of drafting a regulation that creates an effective program while skirting all the legal issues, we recommend that the design of the random testing procedures be left to the employers, if they so chose. Random testing should be solely under the discretion of the employer. If this were done, they could create a program that accomplished the purpose behind the proposed regulation without raising the legal problems inherent in the regulation as it is now written. To accomplish this, at the very least, subsections (b) - (e) should be stricken from the proposed regulation. The better approach would be to remove from the regulation all the present language dealing with random testing and leave only the requirement that an employer create a testing program that conforms with both the applicable federal laws and with the state laws governing it. We are also concerned with rigidity in the mandatory testing which does not allow for the possibility that certain prescription drugs which do not impair operation may lead to false positives.

Section 16.301

This section requires that employer-implemented drug testing programs must be consistent with HHS guidelines and that only HHS-certified drug testing laboratories be used. Our investigation reveals that currently there are no HHS-certified labs. In addition, we have learned that many labs are simply not interested in becoming certified by the HHS because of liability and chain of custody concerns. Maritrans believes that the lack of HHS-certified labs should be addressed by the Coast Guard before their use is mandated as in this proposal.

Section 16.310

Of the proposed options on the structure and operation of rehabilitation programs for employees with drug problems, we prefer the fourth. This option would allow the employer to adapt an assistance program to the employer's budget and the particular needs of its employees. The employers subject to this regulation will vary in size and in manner of operation. The needs of their employees for a drug rehabilitation program will be similarly varied. For this reason, the more latitude afforded employers to design their own programs, the more likely the programs are to properly serve the needs of the individuals they are intended to rehabilitate.

PREPARED STATEMENT OF ERNEST J. CORRADO, PRESIDENT, AMERICAN INSTITUTE OF MERCHANT SHIPPING, BEFORE THE SUBCOMMITTEE ON MERCHANT MARINE, SEPTEMBER 22, 1988

I am Ernest J. Corrado, President of the American Institute of Merchant Shipping, also known as AIMS. The American Institute of Merchant Shipping is a national trade association representing 20 U.S.-flag shipping companies which own or operate approximately nine million deadweight tons of tankers, dry bulk carriers and other oceangoing vessels engaged in the domestic and international trades of the United States.

We appreciate the opportunity to testify today on this critically important issue of drug use. Mr. Chairman, we recognize that drug use is a problem in our society and we are willing to do our part to curb drug use aboard ships, although this does not mean that we in any way agree with the haste in the present rulemaking of the Coast Guard.

Perhaps our main comment to you today is that we must be careful and we must have a reasoned approach. The first factor is that we are dealing with the rights of individuals and reasonable rules are a must. Second, we are involving companies in unacceptable ways including functioning as enforcement personnel and, third, the maritime industry is unique. We are unique and vary widely in our hiring practices. Many of our vessels are frequently more than 24 hours from U.S. ports or are actually in foreign ports, replacement of personnel may be difficult, and incidents could involve several persons on board a vessel. We could continue detailing the unique aspects of the marine industry, including the major differences in types of vessels, such as the fishing vessel and an oceangoing container vessel, although we think the point is without debate that the marine industry is different from aircraft, trains, trucks and buses. Those industries have been addressed in notices of proposed rulemaking issued by their respective regulatory authorities concerning drug use. Mr. Chairman, each had some form of advance notice of the respective action by their regulatory authority either through a formal advance notice or other means. Each was given ninety days to comment on the notices resulting from the advance actions. Characterize those actions against the sixty day comment period without advance notice allotted the marine industry and the basic unfairness of this timetable is obvious. That unfairness is exacerbated by the unique aspects of our situation separating us from the land-based operations of the other modes of transportation. We are different yet accorded less time for review. In all fairness, Mr. Chairman, we believe the least we can expect is to be accorded the same treatment as the other modes of transportation. To that end, we sent a letter to the Coast Guard within weeks of its publication of the notice noting that it was written in the format of an advance notice and requested that it be republished as such. That request was denied. The notice asked over eighty questions and requested specific comments on over thirty areas. Mr. Chairman, a proper notice does not ask questions, it answers them.

With the deadline approaching, we responded as best we could to the notice and suggested major changes to the proposed rules. This is difficult and led to differences of opinion regarding the rule within our membership. Even the speed of facsimile could not keep up with the suggested changes being contemplated within AIMS' companies.

We will admit that certain of our comments may not be acceptable to some of the other industry segments represented here today. We believe our comments have merit and would invite their review in the public process, only further public processes are not contemplated. In fairness to this committee, Mr. Chairman, we cannot sit here today and request any legislative solution. The time is short and the issue complex. There may be time later to consider fully the ramifications of this rule and legislative action at that time may be appropriate. We believe the question before the agencies involved is do they want a reasonable, legally defensible rule or one that will be set down by the courts? We want a reasonable rule, although the one published is not reasonable, fair, or enforceable.

We are enclosing our comment letter to the Coast Guard with our testimony. Our points are described therein, although we would like to highlight certain ones which we believe single out the differences between the marine industry and the other modes of transportation which call for different approaches. Approaches which are not in the proposed rule and may lead to successful legal challenge. It is unfortunate, Mr. Chairman, that on such an important issue as drug testing that fundamental issues were not given complete review.

Many of AIMS' member companies run very effective drug programs and have done so for many years. We believe they should be permitted to continue to do so and any rule should acknowledge the acceptance of these programs. We believe any testing should be done in U.S. ports or if the ship will reach a U.S. port in 24 hours. The company remains responsible for the testing but it can be performed by properly trained personnel, not crew members. We do not feel that testing should be done at sea. We are suggesting major changes in the random testing suggested by the Coast Guard. The proposal is simply unworkable. It may be an appropriate method for shore-based industries but it should not be applied to us in the manner proposed. We believe this concept of testing can be applied to the marine industry but only as testing of the entire ship's complement at a single time. We also suggest that the required adherence to Health and Human Service (HHS) guidelines be dropped. The HHS guidelines were developed by the government as its guidelines as an employer. We suggest that companies be permitted to develop their own guidelines as the government did for itself.

Mr. Chairman, this rulemaking begs for further review. As we noted in our comment letter, the Coast Guard has set precedent in past rulemakings of similar complexity for in depth review via the administrative processes of advance or supplemental notices. The licensing and tankerman regulations are examples.

The proposed rule also raises questions which should be answered, such as:

- Is it reasonable to expect at sea testing to replicate the medical safeguards inherent in medical facility testing?

- Is the seaman tested at sea protected from a false positive result as the shore-based worker is?

- Is the shipowner or the person taking the test liable if the test is performed incorrectly and there are injurious results?

- If post-accident testing establishes drug use, does this establish negligence or affect seaworthiness?

- Twenty-five percent of the incidents referred to in the proposed rule as a basis for the rule were accidents between recreational vessels and commercial vessels. Should recreational boaters be subject to the rule?

- Is the government responsible if a person completes a mandated rehabilitation program and uses that fact to gain employment and is later found to be a user who is involved in an incident?

- Are the HHS guidelines reasonable when they were written without public input and are not contained in the Code of Federal Regulations?

- Do the HHS guidelines operate in restraint of trade?

- Does the U.S. intend to take any action necessary to free a U.S. citizen incarcerated overseas for a positive result of a drug test performed on a U.S. vessel in compliance with the law?

Mr. Chairman, several months ago we heard of a program within the U.S. Customs Service called the Carrier Initiative Agreement Program. It is a cooperative arrangement between Customs and *individual companies to help prevent drug smuggling.* Our members discussed this program at a meeting and many have signed agreements and many others are in the process. Our members want to cooperate with the government in response to our nation's drug problem. However, we want to do it responsibly and reasonably.

We appreciate this opportunity to testify and would be pleased to answer any questions.

ENCLOSURE

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September 6, 1988

Executive Secretary
Marine Safety Council (G-LRA-2/21)
U. S. Coast Guard
2100 2nd Street, S.W.
Washington, D. C. 20593-0001

Gentlemen:

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel -- CGD 86-067

The American Institute of Merchant Shipping (AIMS) is a national trade association representing 20 U.S.-flag carriers which own or operate approximately eight million deadweight tons of tankers, dry bulk carriers and other oceangoing vessels engaged in the domestic and international trades of the United States.

The following comments are submitted with the understanding that the marine industry has been allotted a short time to prepare positions on the effect of the proposal on operations and to assess whether or not the proposals provide an effective program. We believe by its own actions the Department of Transportation supports the contention that more time be given for review. The other modes of transportation were given ninety days to comment on notices after each had been given some type of advance notice through formal advance notices or other administrative procedures. If the other modes of transportation needed longer time frames to provide meaningful input, then maritime should be accorded a similar time frame. This becomes imperative considering the differences between the maritime industry and other transportation modes which include the hiring practices whereby a person can, and many do, work for several employers in a year period; the location of workplaces which is very frequently more than 24 hours from shore points; and, the longstanding law prohibiting drug use or possession aboard vessels with the justifiably harsh outcome of loss of seaman's papers. There is also a great diversity within the industry which includes deep seagoing ships with crews of thirty or more, coastwise towing vessels with smaller crews, fishing boats, offshore supply boats, river excursion craft, ferry boats, and others. It is not impossible to write rules covering this industry, although it takes time to do it correctly. We believe it is axiomatic that a Final Rule based on a sixty day comment period will be unacceptable to at least a significant portion of the industry. To prevent the problems associated with the present timetable, we request that the next administrative procedure be a Supplemental Notice of Proposed Rulemaking. This will give the Coast Guard the opportunity to review comments and re-propose the rules with careful attention paid to the reasonableness of the test procedures.

Noting the above, we would like to make the general observation that many of our member companies run effective drug control programs. We believe these programs should be recognized in a regulation by noting that companies can continue operating their programs. The basic goal of effective deterrence is being reached by those companies and they should be permitted to continue administering their drug control programs in the manner they are presently doing so. Further, some companies are operating drug control programs in conformance with U.S. Navy contractual requirements. Both companies operating programs on their own volition and those meeting contract requirements correctly believe their programs are satisfactory and should not be changed without sufficient cause.

In beginning our comments on the paragraphs in the proposal, we state that AIMS supports the effort to require drug control programs to keep drug users off our vessels. We believe it can and must be done in a reasonable manner to safeguard the company and the individual.

As a basis for specific suggestions on the sections in this proposal, we would like to make some general comments based on the proposed required drug tests.

- Pre-employment testing being performed now is frequently under labor/management agreement. Any requirements in this area should recognize these agreements. These agreements may involve the union performing tests and providing confirmation to the person tested. This may be done a period of time before the person is sent to fill a job. The testing by the union is accepted by the company as fulfilling the pre-employment requirements and should be recognized in the regulations.

- Reasonable cause testing should be recognized and sanctioned but not required. The master should have the opportunity to require testing for cause in accordance with his judgment of the person's actions.

- Post accident testing should be based on the present required Form CG 2692. There is no compelling reason to deviate from the present use of Form 2692 including stipulations on what accidents require submission of the form. It should also be limited so as to not include accidents traceable to purely mechanical failure. We have reviewed a number of Form 2692s filed in the past two years and the vast majority do not involve situations where there would be reason to test for drugs. We suggest that reasonableness be used as a factor in the selection process, that it only be performed by third parties answerable to the enforcement agency, and that it only be done in port or if the vessel arrives in port within 24 hours of the occurrence. We do not believe it appropriate to act as an enforcement agency at sea.

- Random testing as required in the proposal is not practical. There is another testing scheme which meets the same principles as those called for in the proposal and would be more cost effective. We refer to this as "unscheduled testing of work units" which, with respect to our segment of the industry, would be vessels. Under this program, a vessel would receive an unscheduled test when all personnel on board would be screened. The Coast Guard and company involved would agree on a percentage of their vessels to be tested not to exceed 100% taking into consideration existing programs. The program could be designed to lessen the percentage testing as the effect is evaluated.

- There should be no implied consent. Where consent is necessary, it can be written.

- Any qualified testing laboratories should be acceptable. Present testing is being performed without adherence to the HHS guidelines which are in fact the government's guidelines as an employer. Private companies are able to evaluate labs on their own behalf and can use the guidelines if they feel it beneficial to do so. The guidelines themselves note they are only for adherence to an Executive Order and are not to be used for other purposes.

- Employers should not be required to take samples. We see no reason to assume the role of the enforcement agencies and do not want the liability of taking blood samples nor the responsibility of adherence to chain of custody requirements. Therefore, we are recommending changes so that testing will only occur in U.S. ports or, as in the case of post accident and reasonable cause, when it is practicable for the testing to be done within 24 hours. All taking of samples and testing should be done by qualified and properly trained individuals in a setting conducive to privacy, chain of custody, and medical cleanliness. The conditions of a medical facility cannot be met at sea aboard merchant vessels. Testing aboard merchant ships by other than properly trained and equipped medical personnel would not be a reasonable test of the individual. Testing outside the U.S. would raise questions: What if foreign authorities take action on an individual who tests positive? Would a false positive unfairly penalize both company and individual? What about privacy of the individual when mailing from foreign locations would be required? What benefit is there in taking a sample at sea, waiting to the next port, mailing, getting a positive result, then being required to run a reconfirmation test?

- Employer Assistance Programs. While rehabilitation programs may be desirable to some, they should not be required in regulations. This is clearly an area for labor/management agreement or independent volitional action by either unions or companies.

Specific suggestions on the individual sections are as follows:

Section 4.03-2 -- Change by referring to CG Form 2692.

Section 4.03-4 -- Add pilots (both state and federal) and contract employees to the description.

Section 4.03-5 -- Delete the reference to the HHS guidelines. The phrase "recognized professional standards" is sufficient.

Section 4.05-1 -- Amend to refer to CG Form 2692.

Section 4.05-1(A)(3) and (4) -- These two paragraphs should be deleted. As noted above, we do not believe it appropriate to assume the role of enforcement agency nor train our personnel in medical techniques and law enforcement procedures. We do not believe these tests, as envisioned in the proposal, are reasonable.

Section 4.06-1(a)(2) -- Add after "the criteria in Section 4.03-2" the phrase "and there is reasonable suspicion that persons have used dangerous drugs". After "any" add "such".

Section 4.06-1(A)(5)viii and ix -- Delete "or vessel personnel" from both sentences.

Section 4.06-1(b)(1) -- Delete this paragraph as it refers only to vessel personnel performing tests.

Section 4.06-1(b)(2) -- Change to read "When a person directly involved in a serious marine incident is unconscious or otherwise unable to provide consent, the requirements of Section 4.06-1(A)(2) do not apply."

Section 4.06-5 -- Change phrase "is deemed to have given his or her" to "is required to give written...". There is no reason why this cannot be a written consent which cannot later be denied.

Section 4.06-10 -- This can be deleted as the employer would use recognized testing labs which would be responsible for the samples.

Section 4.06-15 and 4.06-20 -- These should be deleted as they refer to an employer administered test.

Section 4.06-25 -- This should be deleted as it refers to the employer taking samples. Additionally, if drug deterrence is the principle of the rulemaking, we see no reason to take these samples. This type testing is usually performed by an enforcement agency as the results are only applicable to accident statistics.

Section 4.06-30 -- Delete as this would only be applicable outside the U.S. where we cannot agree to any testing regulations.

Section 4.06-40 -- Delete. HHS guidelines should not be used.

Section 4.06-45 -- Delete. This is a matter for labor/management agreement. It is not essential to a drug deterrence program.

Section 16.101 -- Add a paragraph (d) allowing an employer to operate a program meeting the goals listed in (a) even though certain program elements may differ from the standards.

Section 16.105 -- Delete "Random Sampling Program."

Section 16.110 -- Rewrite to require written consent. In (a), change "is deemed to have given his or her" to "is required to give written" in two places. In (c), change "shall be deemed to have consented" to "shall give written consent." Paragraph (d) is unnecessary and should be deleted.

Section 16.201(b) -- After "a license," add "state or federal pilot license."

Section 16.201 -- Add a paragraph (d). "The vessels described in paragraph (c) when in U.S. waters or, with respect to the requirements of 4.06 and 16.205(e), if the testing can be accomplished within 24 hours in a U.S. port during normal vessel operation." This would appropriately limit testing to U.S. waters or, in case of reasonable cause and post accident, if the vessel will reach a U.S. port under normal operations within 24 hours.

Section 16.205(b) -- Change the last phrase "to undergo a urinalysis" to "to provide the results of a urinalysis." This would permit the existing labor/management agreements under which the union does the testing and provides the results to the employer. This testing usually occurs before the person is shipped to the vessel. This is an important element. Vessel operators do not want to hold a vessel while waiting for drug test results nor do they want to ship a person who may test positive and later have to be removed from the ship and transported home.

Section 16.205(d) -- Change to refer to an Unscheduled Testing Program.

Section 16.205(e) -- Change "shall" in the first sentence to "may." The important action is to remove a person from performing duties; a secondary decision would be whether or not to test. With respect to alcohol, observable behavior is the key to removal. It is beneficial for the master to have the authority to require a test for cause although it would be unduly restrictive to require the testing at all times. Change "At least two of the employee's supervisors" to "The master and another person selected by the master...".

Section 16.210 -- Change to "Unscheduled Testing Programs."

Section 16.210:

Paragraph (a) -- Change "random" to "unscheduled."

Paragraph (b) -- Change "Random basis" to "Unscheduled"; change "member" to "vessel"; change "Random" to "Unscheduled."

Paragraph (c) -- Change to read: "The employer annually shall test on an unscheduled basis a number of his vessels not to exceed 100%. This number may be reduced based on test results."

Paragraph (d) -- Delete "All crewmembers on." Start the paragraph with "The following." Change "random" to "unscheduled". Add new paragraph (d)(3) -- "All crewmembers on a vessel subject to an unscheduled test shall be tested."

Paragraph (e) -- Change "random sampling program" to "unscheduled testing".

Section 16.301 -- Delete. HHS guidelines are inappropriate to commercial operations and are only to be used in federal agency compliance with Executive Order 12564 as is explicitly pointed out in the guidelines.

Section 16.305 -- Delete references to HHS and include the list of dangerous drugs in this rulemaking.

Section 16.305(d) -- Delete reference to second positive test. One positive should subject user to loss of license or merchant mariner's document.

Section 16.310 -- Delete. These programs are optional and belong in the labor/management bargaining arena.

We believe the above changes reflect a positive approach which can attain the desired goals while not encumbering the industry with unnecessary and therefore unacceptable costs. A very sizable portion of the deep sea fleet is in competition with foreign-flag ships which would not be subject to the main parts of this rule except that referring to accidents in U.S. waters. Aside from the issue of foreign competition, decisions in the marine industry are made on cost effective bases. There is no reason to spend more than necessary to achieve a goal and there is no reason why that approach should not be applied here. The anticipated costs of the proposed rule is much higher than is stated in the proposal and, therefore, the effort to reduce costs is supportable even when dealing with the issue of drug use. We believe the cost of the drug test analysis is underestimated by at least 50%. Increasing those figures to their proper amounts places the rulemaking in the category where an economic impact analysis must be performed. We believe this is a necessary ingredient for an informed rulemaking. The costs are not limited to the testing program itself but include costly shifts in potential liability. Is a vessel unseaworthy if a person is tested positive in post accident testing? This is only one liability question which could have major consequences.

We recognize the above suggests major changes to the proposal. Changes nevertheless which are necessary to adapt the program to the unique situation within the maritime industry. It is clear from reading the proposal that it contains elements applicable to land operations. It is just as clear that those elements must be dropped or adapted to this industry. Without those changes, we believe the reasonableness of the requirements will not survive legal review.

Because of time constraints, these comments have been reviewed by our member companies although the normal in-depth analysis of the proposal and suggested changes has not been possible. Nor has it been possible for the various segments of the industry (towing, fishing, ocean, etc.) to discuss changes which may be beneficial to one while possibly not to another. We believe our suggested changes have merit and are supportable; however, we do not presume that the major shift to bring credibility to this rulemaking can be accomplished without another public review. Therefore, we strongly support publication of a Supplemental Notice of Proposed Rulemaking. In the very recent rulemaking on licensing, this was found necessary by the Coast Guard in order to develop a reasonable final rule. The motivation for that action is also present in this rulemaking, i.e. an all-encompassing issue; strong public comment for more time to digest the complexities; a divergence of opinion; and, a direct affect on individuals. Additional factors not present in the licensing rulemaking although present here include: aspects of individual privacy; company liability with respect to direct drug testing activity; and shifts in accident liability.

As a final comment, we want to note that we support the goal of preventing drug use aboard our ships and can support a constitutionally sound program which protects the public and the individual. Extreme care must be taken. There is no reason for undue speed in this process. Thoughtful, fully informed review will serve best. There are no data suggesting that drugs are causing great numbers of accidents; in fact, the proposal notes such absence. A good job is being done so far. If we can add to that, let's do so. If we cannot, then our responsibility as a nation is to clean up other areas first.

We look forward to a positive response to the above suggestions and are available should you need further information or clarification.

Sincerely,

Joseph J. Cox

Joseph J. Cox
Vice President

Speaker: Ezra Schneier, Vice President,
Marine Index Bureau, Inc.

The Marine Index Bureau (MIB) appreciates this opportunity to comment on the Coast Guard's proposed rules for chemical and alcohol testing of commercial vessel personnel. For over fifty years, MIB has has served as the sole national repository for records of accidents, injuries and illnesses involving marine personnel. Today, MIB collects such records from more than 350 member companies, representing every aspect of the U.S. maritime industry.

These companies are engaged in ocean commerce, inland and coastal towing, dredging, commercial fishing, passenger transportation, offshore supply, oceanographic research and other activities. Virtually all members of MIB stand to be affected by the proposed rulemaking.

First and foremost, we wish to state our support for the Coast Guard's efforts to develop a regulatory program aimed at ridding the maritime industry of drug usage and alcohol abuse. MIB members firmly believe that the only acceptable workplace is an alcohol and drug-free workplace.

So pervasive is drug abuse today, many marine employers consider it the single greatest problem in finding qualified personnel and retaining employees. Costly and destructive, drug abuse is infecting our communities and workforce. A tenable argument can be made that alcohol and drugs are scourging the U.S. maritime industry just as they are other American industries. To be sure, something has to be done to fight drugs. And the problem is soluble.

MIB and its members appreciate the relationship between safety in the marine setting and prevention of drug usage and alcohol abuse. Many of our member companies have instituted drug and alcohol abuse prevention programs. Some of these programs employ limited drug testing while others have extensive programs in place. Our consideration of the proposed rules leads to the conclusion that the elimination of alcohol and drugs will be best accomplished by voluntary programs tailored by each employer to fit his specific operation. It is the diversity of vessel operations within this industry that makes the implementation of a single set of regulations onerous.

Many of the employers who would be governed by these proposed rules already have in place well developed programs to combat drug usage and alcohol abuse. These programs have been proven to work. They were developed at great cost of time, effort and money to increase productivity, improve safety and reduce accident liability. Enactment of mandatory regulations would interfere with, and in some cases completely dismantle, the effectiveness of these programs. The proposed rules will serve to destroy the progress being made by the private sector on a voluntary basis.

The Coast Guard's proposed rules, in effect, require that all maritime employers abandon their current efforts in favor of continuous testing of crewmen at the employers' expense -without any demonstrable added safety benefit. The significant cost of implementing alcohol and drug programs, in accordance with the proposed rules, would be prohibitive for many operators.

Let the Coast Guard work with employers in setting forth practicable programs created by industry for the use of industry.

MIB has long maintained that expenses incurred creating a safe work environment are always recouped in the form of lower loss rates. We believe this will hold true for the expenses related to voluntary, employer-created drug testing programs, too. However, due to the broad differences among vessel operators, a single set of regulations, enforced upon everything from a small, locally owned and operated fishing vessel to a VLCC or a giant container ship trading around the globe, would result in unduly high costs for implementation.

Many firms cannot afford to comply with sweeping mandatory drug screening regulations. If the proposed rules are enacted and enforced we will, without question, see the failure of some marginal companies. And the U.S. maritime industry cannot afford this consequence. A voluntary program which rewards operators for instituting drug testing programs would be more effective. Further, a voluntary program will not impair the survivability of those operators presently in financial straits because of recent market conditions.

Discussions among MIB members since the issuance of the Notice of Proposed Rulemaking indicates that all of the components described can work for some companies. But no company's operations can or need to include each and every element of the proposed rules.

A survey of MIB members indicates that 76 percent of the companies responding are currently doing pre-employment drug testing. To be sure, pre-employment testing will be an important factor in most voluntary programs. Yet some companies, especially those operating vessels with short turnaround times and unscheduled services, find pre-employment testing impossible. Typically, a seaman is hired on short notice and may join a vessel only hours before departure from port. Since the results of drug screening tests may take several days to confirm, true positive results would not be known until after the vessel was well out to sea.

Some companies who find themselves in this situation conduct reasonable cause drug screening. These programs have been initiated as a condition of employment. Crewmen have given affirmative consent to these procedures when joining the company's employ. In instances where collective bargaining programs are in place, drug testing programs have been negotiated and agreed upon by management and labor. The Coast Guard should not require reasonable cause testing but should suggest guidelines for employers who choose this option. Suggested definitions of "reasonable cause for testing purposes" would be most helpful.

Post accident testing is problematic. Many feel that this is an investigative function best handled by the Coast Guard. Positive test results may increase an owner's liability in civil litigation. Understandably, employers are reluctant to accept the responsibility of collecting and reporting this kind of evidence. The results of post-accident testing will be discoverable in litigation.

In the opinion of MIB's counsel, as a result of the Coast Guard deputizing vessel owners to perform their law enforcement function, one could expect Constitution-based challenges to these regulations. Whereas current, employer-sponsored programs do not invite Contitutional challenges, the proposed rules will encourage lengthy and expensive litigation to determine these issues.

If a foreign-flag vessel is involved in a collision situation, this vessel would not be required to conduct post-accident testing. This obviously would create an unfair disadvantage in litigation if the state of one vessel's crew could be ascertained and not the other. Fully 95 percent of the deep draft tonnage operating at any given time is foreign flagged.

If the proposed Coast Guard regulations are put into effect, an owner who breaches the rules would find himself in the following difficult, if not impossible, situation. Since the Coast Guard regulations are designed as a "safety" statute, an unexcused violation could be conclusive on the issue of negligence, and the Court would direct the jury that if it finds the regulations were breached, then it must find the owner negligent. This theory of law is called negligence per se. Additionally, the Jones Act has expressly incorporated the Federal Employer's Liability Act (FELA). Section 53 of FELA provides that there is no diminution of damages if the injured is found to be contributorily negligent, if the carrier breached a statute enacted for safety of employees.

In sum, the proposed rules would over-regulate the various sectors of our maritime industry. Government regulation of this magnitude would undoubtedly interfere with the programs now in place and would actually serve to interfere with attaining the goal of a drug free environment. A voluntary approach to testing, combined with the Coast Guard's existing rules to reduce alcohol abuse and drug usage (52 FR 47526, 14 December 1987) is the best way to address the issue.

Voluntary guidelines published by the Coast Guard need not and should not be considered the final word on the subject. Periodic reviews of the effectiveness of the voluntary programs will be necessary. It is important to recognize that a quick solution to this problem cannot be found within a single set of regulations. But this is a soluble problem. Employers have already demonstrated their commitment to zero tolerance.

The health and safety of our workforce, and indeed the future of the American Merchant Marine, may well depend on the extent to which industry and government can develop an appropriate response to the epidemic use of drugs that plagues our country.

A seaman who is under the influence of drugs or alcohol is clearly unable to properly perform his duties. The cost of this seaman to our industry takes the form of lost productivity, possible injury to himself and fellow crewmen or perhaps even death.

The drug epidemic is a soluble problem. Drug usage and alcohol abuse in the marine workplace must be addressed forthrightly and decisively with due consideration of the unique constraints of the maritime industry.

We would like reiterate the fact that this is an industry with a deep commitment to providing an intoxicant-free workplace. MIB and its members look forward to working closely with the Coast Guard in the development of a workable program to permanently rid intoxicants from the marine environment.

Thank you for your consideration of our comments.

PREPARED STATEMENT BY BILL S. PERSON, MANAGER OF INDUSTRIAL RELATIONS, ROWAN COMPANIES, INC., ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AND THE NATIONAL OCEAN INDUSTRIES ASSOCIATION, BEFORE THE SUBCOMMITTEE ON MERCHANT MARINE, 22 SEPTEMBER 1988

INTRODUCTION

The offshore drilling industry has been a leader in developing and implementing programs for drug testing in the workplace. The IADC has contributed to our national agenda for reducing drugs in the workplace by participating on the Transportation Committee of the White House Conference for a Drug Free America. We have been in the forefront of drug testing efforts. We commend the Coast Guard for its interest in extending such programs to an even wider scope of maritime workplaces.

We estimate that drug testing is presently conducted on 90 percent of active U.S. offshore drilling rigs. Accident statistics collected by the International Association of Drilling Contractors reflect the effectiveness of such programs. Over the past five years the lost time incidence rate for offshore drilling has dropped from 5.29 to 2.65, a reduction of 50%. Without question a significant portion of this reduction is due to the industry's wide spread application of drug testing policies.

However, we view the proposed rulemaking with great alarm. The rules proposed by the Coast Guard will completely dismantle the effective programs now in place within our industry. They will undermine the achievement of our goal of zero tolerance. They will raise costs to a prohibitive level.

INDIVIDUAL RANDOM TESTING

First and foremost, the random individual employee testing requirements are totally inappropriate for application in the offshore drilling industry, where each work site is a remote or isolated location with personnel confined aboard the offshore facility. The industry practice is to conduct drug testing of every employee of the drilling contractor aboard a drilling unit at the time that unit is selected for drug testing.

It is not difficult to imagine the impossibility in terms of time, manpower and cost to logistically comply with the proposed rule requiring random testing of individuals.

One, our experience shows that deterrence of drug use aboard mobile offshore drilling units is best achieved by testing all employees at the work site at the same time. The random selection of only a few individuals aboard a drilling unit for drug testing does not have the same deterrent impact on drug use as does testing the entire crew.

Second, when the full crew complement is tested at one time, the employees feel that testing is being done for the safety of all aboard and that no one employee is being singled out for discrimination.

Third, the helicopter transportation required to go rig-to-rig across the entire length and breadth of the Gulf of Mexico would be horrendously costly, conceivably raising the cost of testing one individual on a remote rig to $2,500 just to reach him.

For a ten rig company, we estimate that meeting the proposed regulations will require over 600 helicopter trips offshore to annually test 125% of the employee population on an individual random testing basis. This amounts to transportation costs alone in excess of one and one-half million dollars. The Coast Guard $15 per test cost estimate has just gone through the ceiling.

The reduction experienced by companies in the number of positive drug screen results proves the success of our current programs. The decision of when to test, and who to test, should remain at the discretion of the employer. There is no reason to believe that changing existing programs will produce a further reduction of positive drug test results. This section should be modified to accept currently proven random/unannounced testing programs, involving all personnel on-site.

Further, the on-site program utilizing the EMIT-st methodology, allows for immediate suspension of an individual who tests positive, pending confirmation results. We do not support any set minimum or maximum number of employees to be tested per annum.

HHS GUIDELINES

The offshore drilling industry's successful reduction of drug abuse onboard offshore drilling units has been accomplished utilizing laboratories certified by other than HHS or NIDA guidelines. The present flexibility in selecting facilities that can produce a timely response to test sample submittal has, we feel, assisted greatly in reducing our exposure to accidents caused by personnel who are under the influence of dangerous drugs. The proposed restriction of drug testing to HHS or NIDA laboratories will limit our access to local testing facilities who have serviced us well but, for financial or other reasons, may be unable to obtain or unwilling to seek certification under HHS or NIDA. Our industry cannot accept the possibility of time delay in removing violators from our facilities. The success of our present programs provides sufficient evidence to substantiate a recommendation that the proposed rules be amended to accept presently used laboratories and legally defensible methods of drug screening.

We cannot conduct an effective program if there is the possibility of testing by mail, whether overnight delivery or otherwise. HHS guidelines relative to "batching," written release of information, company medical officers, etc., will dilute the effectiveness of current programs. It is estimated that it will take five days per batch with HHS on NIDA laboratory methods.

Such delay will allow an abuser to remain in the work force, possibly injuring himself, or worse, injuring a fellow employee. Immediate, verbal release of results to the company is absolutely necessary.

We strongly suggest that any proposal be amended to accept laboratories which meet the College of American Pathology, or another recognized laboratory approval body's guidelines.

IMPLIED CONSENT

We do not agree with the proposed statement that employment on a vessel implies consent to drug screening. We believe this position will subject the employer to unnecessary legal land financial hardship. We suggest that this section be replaced by a consent-to-test requirement.

PRE-EMPLOYMENT TESTING

Pre-employment drug screening for U.S. employees working on the OCS has proven successful in reducing drug abusers in the workplace offshore. However, we do not believe that pre-employment testing of non-U.S. persons in non-U.S. waters can be successfully mandated by the U.S. Coast Guard without reference to local host government limitations. We recommend that pre-employment testing be conducted, but that the responsibility remain with the employer, and not be a mandate for foreign water operations.

PERIODIC TESTING

Periodic testing is a little, if any, benefit. There is no evidence that periodic scheduled or announced testing reduces the drug using population. Conversely, by providing advance notice of a test, the results are more likely to be misleading because of the temporary suspension of abuse until after the test. We suggest that periodic testing be removed from this proposed rule.

ALCOHOL TESTING

Alcohol can be a problem on vessels where alcohol is allowed onboard or personnel have regular access to shoreside supplies. However, such access is not given to offshore drilling personnel. Experience from offshore rig search programs does not reflect any noticeable instance of alcohol being found, let alone consumed, on an operating unit. Industry pre-employment, search and random/unannounced testing statistics reflect a positive result rate of less than 1/100th of a percent. We suggest that mandatory alcohol testing be removed from any final rule.

Further, the requirement for maintaining breath analyzer equipment and trained technicians aboard MODUs is unnecessary, costly without benefit, and too restrictive in terms of available, alternative testing technology.

REASONABLE CAUSE TESTING

The proposed requirement that the decision to conduct a drug test be based upon the subjective judgment of one or more persons is not prudent. It subjects the employer to the possibility of discrimination litigation. Our present programs contain guidelines for "reasonable cause testing" based on qualitative or quantitative results. "Reasonable Cause Testing" is best conducted when left to the discretion of the employer.

The Coast Guard must allow each company sufficient latitude to decide when reasonable cause testing is warranted. Since the purpose of any program is to enhance safety, rather than to allegedly harass individuals, each entity covered should be allowed the right to send an individual(s) in for testing or, alternatively, perform on-site testing of the complete crew and third party compliment.

POST ACCIDENT TESTING

We agree with "Post Accident Testing." However, specific procedures should be defined by individual company policies, taking into account the unique work situations and circumstances of the event.

The proposal, as written, could negatively impact the safety of the vessel. Subpart 4.06-1 states that "the marine employer shall take all practicable steps to assure that any person directly involved in the casualty or incident is transported to a medical facility or to qualified medical personnel for the purpose of obtaining blood and urine samples as soon as possible or to transport qualified medical personnel to the vessel for the same purpose as soon as possible, when it is feasible to do so within 24 hours after the incident." This may require the removal of a majority of supervisory personnel for testing purposes, during which time an emergency situation could arise that would require their presence. Alternatively, requiring the obtaining and shipping of urine samples to an "American Medical Facility" within 24 hours following an incident is not always possible. We propose that if an injury requires shore-based medical attention, then all reasonable efforts shall be made to test the injured party.

An alternative would be to utilize a device such as the "insta-screen" for post-accident testing. Such a device gives immediate on-site results. If the test is positive, whether by the injured party or an individual directly involved, then additional shore-based testing can be conducted.

RANDOM TESTING

The offshore drilling industry supports random unannounced testing of our personnel aboard the vessel at one time as evidence by the widespread application of such tests in this industry. The reduction we have experienced in positive drug screen results proves the success of random testing programs. We feel, however, that the decision of "when to test" and the selection of "who to test" should remain at the discretion of the employer. There is no evidence to show that changing existing programs will produce a further reduction of positive drug screen test results. We recommend this section be modified to accept currently proven random testing programs of simultaneously testing all personnel aboard MODUs.

EMPLOYEE PRIVACY

Although we might agree that the sharing of drug test results of employees would reduce the employer's exposure to potential drug abusers, we also feel that disclosure of any test results would be considered as a potentially discriminatory practice that could lead to abuse of an individual's right to privacy. We are against any form of reporting that might generate litigation and as a consequence result in a regression in our attempt to remove drugs form the workplace. Clearly, a legal battle of any consequence on this issue may well stall or suspend our drug testing efforts. We understand the Coast Guard's desire to eliminate drug abusers from their list of licensed personnel but we feel that to place the responsibility of positive test result disclosures on the employer would subject the employer to severe exposure in litigation.

EMPLOYEE ASSISTANCE PROGRAMS

While many company's may sponsor E.A.P. as part of their benefits, it is the position of the IADC that the Coast Guard should not promulgate any regulations that interfere with the employer's rights to take disciplinary action against employees who violate company policies, thereby endangering others aboard the vessel. The Coast Guard should not mandate or require E.A.P. This is an area of private enterprise decision that is properly the province of the employer-employee contract, and is not a place for federal government intervention or imposition.

Studies have conclusively proven the ineffectiveness of rehabilitation programs (The White House Conference for a Drug Free America, Final Report.

It is a general policy to afforded employees rehabilitation benefits, provided they volunteer for such a program, prior to testing positive. We support the proposed option number four, wherein rehabilitation would not be mandatory.

RECOMMENDATIONS

We wish, in conclusion, to make three recommendations.

I. One, this rulemaking, so far as it applies to offshore drilling units, should be confined to the U.S. Outer Continental Shelf.

II. Two, the Coast Guard must not apply these regulations to offshore drilling units. Provision should be made for approval of an alternative set of rules for drug testing of personnel at isolated or remote locations where the personnel are confined to the facility. Alternatively, we recommend the Coast Guard consider a separate rulemaking to be applied to mobile offshore drilling units. The Coast Guard should draw upon the drilling industry's expertise in the area of contraband interdiction. Any rule must allow each drilling contractor to tailor their program to meet their specific goals. Current programs have proven their effectiveness and should, therefore, be allowed to remain in their present form.

We stand ready to assist the Coast Guard in drafting regulations that specifies self-certification of currently proven contraband interdiction programs.

Our proven expertise in the area of contraband interdiction should be taken into consideration to avoid regression on this subject. We believe it is not meaningful to compare factory workers, truck drivers, aircraft pilots and mechanics or other land-based workers to workers engaged in offshore drilling. Our employees live and work offshore for their entire shift, which is generally 14 days, without any land-based connection. We, therefore, believe that a standard similar to those proposed for other Department of Transportation covered industries is inappropriate. Current marine industry practices should be allowed to remain in force, if they produce the desired results.

III. Three, recognizing the unique operating circumstances and manning requirements of the offshore drilling industry, we believe the scope of subject proposal is unclear regarding third party personnel (i.e. those employed by the oil company and various subcontractors). All personnel aboard the unit, whether temporarily or permanently assigned, should be subject to, at a minimum, random/unannounced testing along with all other personnel aboard the rig. Pre-employment and post-accident testing should be the responsibility of the third party employer.

A review of one company's personnel records reflects that on the average 36.7 percent of the individuals aboard an operating unit are employees of third parties.

Since the second quarter of 1984, this company reports testing 1,545 individuals (1,172 company and 373 third party personnel), on-site, with 62 individuals testing positive (4.01 percent). Of the 62 positive test results, 38 were company employees (3.24 percent failure rate) and 24 were third party personnel (6.43 percent failure rate).

Their on-site statistics reflect that third party personnel are twice as likely to test positive (3.24 percent company failure rate versus a third party failure rate of 6.43 percent).

SUMMARY

The offshore drilling industry has conducted successful drug testing for over five years, producing significant results in reducing drug abuse aboard our MODUs. These policies have been tested in the courts and in the marketplace. The courts have sustained the propriety of our policies. Where they have not, we have changed them to comply. **Our employees and their families have supported these policies as a positive step by the employer to provide them with a safe place to work.**

While we support drug testing to ensure safety of personnel, we cannot support the specific requirements set forth by the Coast Guard in these proposed rules. These rules are impractical and ineffective for application in our industry. Despite their good intentions, they will have the actual result of destroying the achievements already made and lead to an increase, not a decrease, in drug related safety problems aboard offshore drilling units.

The rules do not give full consideration to the drilling industry's international manpower situation and the limitations placed upon MODUs operating in the territorial waters of other sovereign nations, often employing their nationals in compliance with their laws. We do not believe that enforcement of these drug testing requirements can be successfully achieved on non-U.S. citizens employed aboard the vessel, particularly in non-U.S. waters.

IADC is not opposed to drug testing. The offshore drilling industry is a pioneer in the field. We have successful, legal policies and programs that are wholeheartedly accepted by our employees. We must urge, in the strongest possible terms, that the Coast Guard not proceed with these rules as they now exist. Doing so will be a blow to the real achievements in drug abuse reduction and to the improvements in safe working environments in our industry. We do not think that is the Coast Guard's intention. We certainly hope it will not be your action.

TESTIMONY OF CHAS. R. HAVNEN
VICE PRESIDENT AND ACTING EXECUTIVE DIRECTOR
OFFSHORE MARINE SERVICE ASSOCIATION
OF NEW ORLEANS, LOUISIANA

PRESENTED TO THE
U. S. HOUSE OF REPRESENTATIVES
MERCHANT MARINE AND FISHERIES COMMITTEE,
MERCHANT MARINE SUBCOMMITTEE
WASHINGTON, DC

OVERSIGHT HEARINGS,
DEPARTMENT OF TRANSPORTATION,
U. S. COAST GUARD PROPOSED RULEMAKING
FOR CHEMICAL DRUG AND ALCOHOL TESTING OF COMMERCIAL VESSEL PERSONNEL

SEPTEMBER 22, 1988

Mr. Chairman, other distinguished members of the Subcommittee, my name is Charles Havnen. I am the Vice President and Acting Executive Director of the Offshore Marine Service Association (OMSA). The Association is pleased to be afforded the opportunity to present its views to the Subcommittee concerning the "Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel," Notice of Proposed Rulemaking published by the Department of Transportation on July 8, 1988. OMSA is a national trade association formed to represent the interests of the owners and operators of vessels engaged in offshore mineral support activities, including construction, pipe laying and dredging. OMSA has a membership of 113 companies owning and/or operating some 2000 vessels with upwards of 20,000 employees. Association member companies own and/or operate 90% of the vessels engaged in offshore support activities.

Our industry vigorously supports a "drug free America" and has for many years been a leader among the maritime and other transportation industries in obtaining and maintaining an alcohol and drug free work place. Virtually all vessel operating offshore companies have programs in place to perform these functions. Some of the larger companies have programs that are very sophisticated with high levels of management oversight. Smaller companies tend to have programs that are less sophisticated. They often substitute a simple system with strong emphasis on the knowledge of individual employees by top decision makers coupled with straight forward testing and/or search policies.

The industry programs are viable and highly effective. The alcohol portion of many of these programs date back to the very inception of the industry over 40 years ago. All of the programs were designed to be compatible with the operations of that company and of course are compatible with the maritime nature of the work place. The maritime is unique among the transportation industries because of the extended isolation of vessel crews from physical access to shoreside communities and the facilities that they offer.

The proposed rules contain many provisions that are extremely onerous to vessel operators. It would seem that the Department of Transportation efforts to have uniform methods of testing for all modes of transportation represents a significant portion of the problem. The Department does not take into account this unique nature of the maritime industry which causes the crews of vessels to be isolated from shoreside medical or other facilities while the vessels are underway. One would think that the rules should be supportive of industry's efforts toward a drug free work place. The Proposed Rules seem to invite plaintiff suits and rely not at all upon the experience gained by the offshore industry over the past 40 years. The rulemaking presumes that no effective or mature programs exist in the maritime. OMSA is unaware of ANY evidence indicating that even the simplest most rudimentary anti-substance abuse programs are not effective.

The proposal also confuses and lumps together health and welfare and law enforcement issues. The effect of the proposal is to deputize an employer to apply law enforcement judgments with respect to performance of post casualty testing and other situations where positive test results are obtained. Mandatory post casualty testing is clearly a law enforcement function. This testing cannot reasonably be performed by one crewman upon another crewman without acquiring high plaintiff liability. With small crew sizes on offshore supply vessels, it can often be said that the persons the Coast Guard would want tested after a casualty may include ALL licensed officers and in many cases the entire crew. Establishing a methodology that would insure that a TRAINED crewman not a party or witness to an accident is ALWAYS available to take samples AND retain them in storage that ONLY he/she has access to, seems impossible. Such testing should be eliminated from the rules except where the Coast Guard wishes to perform the tests themselves as part of a law enforcement effort. The performance of mandatory post casualty testing should be reserved to the Coast Guard. Their boarding officers and investigators can obtain the samples and/or perform tests as are necessary in the performance of their law enforcement duties.

Scientifically random testing is among the most severe problem generators and must be eliminated if the maritime U.S. flag is to survive. *Scientifically random* testing seems unworkable in the marine environment. It does not seem possible to have the test performed on personnel whose "number comes up" when he is on his off time and not on a vessel. When a crewman is on a vessel he is apparently to be removed, after a suitable replacement is provided to the vessel and sent ashore for testing. If the vessel is underway at the time, some serious difficulties would be encountered. It is important to note that OMSA member firms already have a good deal of experience with drug testing and have determined that outside entities should be used to perform the tests. If crewmen perform testing or sample collection, it seems highly probable that some form of legal action will be routine in cases where positive test results occur. It does not seem possible for any crewmen to be sufficiently trained in testing and sample collection to hold off legal assaults as to adequacy during a plaintiff action. Unscheduled testing or testing that is perceived by the individual crewman to be random should be used in place of scientifically random testing.

It would be catastrophic to the U.S. flag to apply these rules to U.S. vessels entering foreign ports on international voyages or vessels deployed overseas for extended periods of time. It will not be possible to apply these tests requirements to foreign pilots that board a vessel entering foreign ports or other non-resident foreign personnel that may be aboard for legitimate purposes. In some cases such testing would probably be against the laws of a host nation. The personnel may include industrial personnel, repair personnel, cargo handling experts, and security personnel. Even if all other problems could be resolved, the taking of samples and transporting them to the U.S. for analysis would generate time delays that would be unworkable.

There is also serious concern for potential problems from an individual seaman from whom a sample is taken when he is aboard the vessel. The time between when the sample is taken and when the operator has the results of the examination must be minimal. OMSA believes that an operator's liability during this delay period is extremely high. It would be preferred for all personnel to be tested while not on the vessel or with some form of immediate readout to indicate if he has been using illegal drugs if tested on the vessel.

It is very clear that the HHS guidelines have no place in the private sector. A review of PL 100-71 and the enabling Executive Order 12564 make it clear that the guidelines were never intended for application to the private sector. There is no evidence that any existing drug program in use today is not successful in assuring a drug frew work place.

The implied consent doctrine should be eliminated. In its place, employers could be required to have mandatory participation in company run programs as a condition of employment. Employees could be required to participate under pain of civil penalty and where appropriate, R.S. 4450 action against their right to employment. Employers could certify the contents of their programs to the Coast Guard. Individual company programs could be required to be available to safety audits by the Coast Guard. Third party employers could also be required to certify their programs to the Coast Guard as well as vessel operators. Condition of employment requirements would be mandated of them as well.

OMSA membership has expressed that the final regulations should be applicable to all vessels that engage in Outer Continental Shelf activities. Regardless of whether or not they are U.S. flag or manned by U.S. citizens or resident aliens. Specifically, membership in the Association is concerned about vessels that perform special or industrial functions. Rarely are these vessels isolated from a workplace that does not include U.S. workers who deserve to be assured a drug free workplace. The current version would not appear to be applicable to foreign flag vessels that engage in OCS activities regardless of crew citizenship requirements. The final rules should include these personnel as well.

This project has been rushed toward final rules with apparent disregard for due process as proscribed by the Administrative Procedures Act. It more appropriately, should have been published as an Advanced Notice. If the federal government must promulgate regulations at this time, those regulations should significantly modify the consepts contained in this proposal and eliminate all detailed specifications. These could be established as guidelines or as recommendations for regulations by an advisory committee created for the purpose. The following thoughts are provided concerning possible rules.

* Require that all marine employers have drug programs that include pre-employment testing and permit unscheduled testing as well as testing for cause and post casualty testing when an individual receives medical treatment. Employee indoctrination and training should be probably be included in the program. Employers could certify the contents of their programs to the Coast Guard. Individual company programs could be required to be available to safety audits by the Coast Guard. Third party employers could also certify their programs to the Coast Guard as well as vessel operators. Condition of employment requirements would necessarily be mandated of them as well.

* Require that the company program be promulgated to all personnel as a condition of employment. The implied consent doctrine should eliminated. In its place, employers could be required to have mandatory participation in company run programs as a condition of employment. Employees could be required to participate under pain of civil penalty and where appropriate, R.S. 4450 action against their right to employment.

* Require that personnel are subject to testing in accordance with an employer's program.

* Subject the employers' programs to periodic *safety audits* as government oversight.

* Eliminate the HHS standards for testing. Rely on state regulation of laboratories initially. It is very clear that the HHS guidelines have no place in the private sector. A review of PL 100-71 and the enabling Executive Order 12564 make it clear that the guidelines were never intended for application to the private sector. They were designed to insure that ALL federal employees were treated the same way. The Federal Government, a single employer, had been treating employees in various departments in different ways even when they were doing the same or similar jobs. The Guidelines were extremely careful to assure the SAMENESS of the testing that all employees were to be subjected to. There is no latitude within the Guidelines that can and should be afforded to employers in commercial enterprises. The operations of individual employers vary dramatically. Companies should be allowed to tailor their programs to their own operations and should not be penalized to maintain identical SAMENESS standards. These proposed rules apply equally to operations of such varying scope, as a licensed operator/guide in Alaska, a licensed operator of an uninspected towboat on the Ohio River, a New York Harbor Pilot, a tool pusher on a U.S. drilling rig off of the coast of Brazil or the master of an offshore supply vessel 125 miles off the coast of South Louisiana.

* Eliminate all law enforcement testing from the program. Industry programs should not be used by the Coast Guard or other agency for law enforcement purposes. Samples and testing must be accomplished in a manner that is legally sufficient to protect the vessel operator from plaintiff suits. More regulations in this area does not reduce the likelihood of a handling error but would dramatically increase the likelihood of a plaintiff action.

* *Scientifically random* testing should be eliminated. It would seem that some form of testing factor should be applied to the individual mariners in a way that he may be tested when he does not expect it. This could be accomplished through the application of a *routine search and test* criteria or by an employer selecting the date and time for a periodic examination any time within a six month window. The individual being tested would not be aware of when he or she is to be tested. Other mechanisms could also be used, as long as they are part of the published company plan. Statistically monitoring the numbers

and percentages of substance abuse detected through the unscheduled testing could be used to determine if the program should be maintained as before, intensified or even possibly reduced in intensity. The rules should allow the "routine unscheduled search" and test criteria so often used by industry. OMSA member companies almost invariably prefer the use of outside firms, contracted to conduct searches using the latest in law enforcement doctrine, technology and equipment as well as witnessing the sample acquisition and transport to the test laboratory. In most cases, this has been done on advice of counsel to help protect the company from plaintiff suits by disgruntled employees. At overseas locations where foreign entities exercise jurisdiction, these or other procedures are often not workable or possible. In fact, they may be illegal in some jurisdictions.

* Rehabilitation should be permitted, but never required. Rehabilitation has been found to be an effective tool ONLY when the individual involved desires to be rehabilitated. Current incorporation with company health plans is a reasonable means to facilitate rehabilitation. Under no circumstances should any form of rehabilitation be required to be made available by an employer.

* Establish an *advisory committee* to generate an ongoing dialogue between the Fed, employer, employee and public. While not exercising regulatory judgment, the committee could make recommendations concerning possible detailed specifications for employers' programs and/or testing standards if it is ever determined that they are needed. This would assure a healthy and reasonable interactive regulatory process with the affected entities. Due process of law. In several places the proposal indicates that there is little or no data to support that regulations are required. OMSA believes that there is even less data to indicate that existing anti-drug or alcohol abuse programs are not effective. Further study should be performed prior to application of ANY specific requirements upon companies that have existing programs and/or employees that participate in programs.

It is imperative that new drug standards support company efforts and facilitate the elimination of unnecessary liability and economic burden while not abusing the rights of individual mariners.

OMSA suggests that this committee request the Department of Transportation to report on how the concerns expressed at this hearing today will be accommodated in the rules package. It is important that their report be provided before final rules are issued by the Coast Guard.

PREPARED STATEMENT OF THOR J. LASSEN, GOVERNMENT RELATIONS REPRESENTATIVE, NATIONAL FISHERIES INSTITUTE, BEFORE THE SUBCOMMITTEE ON MERCHANT MARINE, 22 SEPTEMBER 1988

The National Fisheries Institute appreciates the opportunity to testify on the Administration's proposed rulemaking on drug testing of commercial vessel personnel. For those of you not familiar with the Institute, it is a national trade association representing about 1,100 companies located throughout the United States and engaged in all aspects of the U.S. fish and seafood industry.

Our members operate vessels in many of the U.S. fisheries affected by the proposed regulations on drug and alcohol testing. This includes the Atlantic and Gulf of Mexico menhaden fishery, North Pacific groundfish and salmon fisheries, Pacific tuna fishery, and Atlantic squid, mackerel, butterfish fisheries. We estimate that approximately 215 U.S. fishing vessels will fall under the proposed drug testing rule.

One of the main objectives of the proposed regulations is to maintain a safe and drug-free work environment at sea. NFI is in full support of this objective. For the past several years, we have been active in the management of the National Council of Fishing Vessel Safety and Insurance and implementation of its safety programs. NFI also coordinated industry participation in the development of the Commercial Fishing Industry Vessel Safety Act recently passed by Congress. For the last two years, drug abuse has been the focus of NFI's Vessel Committee meetings.

Many NFI members already have drug and alcohol programs in place. These include written policies prohibiting use or possession, vessel and crew inspections, and personnel testing. The programs all vary to suit the particular characteristics of each fishery. The menhaden fishery provides a good example on the extent of these programs.

The majority of the menhaden vessels are subject to random vessel inspections that involve the use of dogs to search for illegal substances. Crew members are required to sign company policies that prohibit use or possession of drugs and alcohol, that advise crew such use will result in immediate dismissal, and that permit the company to search persons and property.

Preemployment, post-accident, and reasonable cause testing are carried out in the menhaden fishery. Employees discharged due to testing positive for illegal drugs or alcohol are eligible for re-employment after completing a certified drug/alcohol rehabilitation program.

Many other fisheries have adopted similar drug and alcohol programs. Employment contracts prohibiting drug and alcohol use are common in the Seattle based fisheries. These contracts describe the company drug policy, establish grounds for dismissal, and grant authority to search crew quarters with the signature of the crew member. Most vessels require preemployment physicals and testing. Reasonable cause testing is done at the discretion of the supervisor or master of the vessel.

Preemployment testing and vessel policies on illegal substances also are common in the U.S. tuna fishery operating in the Pacific. Tuna vessels undergo inspection with the use of dogs both prior to departure and upon return to the U.S. mainland.

In summary, almost all vessels subject to the proposed rule on drug testing are actively involved in industry sponsored drug and alcohol programs. NFI supports these private sector initiatives as a more effective approach to drug abuse problems than broad government regulations.

The immediate impact of the proposed regulations is that they will impose new constitutional and legal problems on existing private sector programs. Courts have upheld the ability of private employers to conduct drug tests. However, now the government is requiring the drug tests instead of the private employer. As a result, drug testing carried out under the proposed regulations especially random and post-accident testing are most likely unconstitutional. Courts have viewed similar regulations as a government intrusion and violation of the constitutionally protected right to privacy or prohibition against unreasonable searches.

In addition to the constitutional problems associated with random testing, NFI is concerned over establishing a federal mandate on the appropriate rate of testing. With a small crew, the vessel owner is in a better position to establish appropriate testing frequencies that avoid perceptions of unfairness by crew members.

Random and post accident sampling are very difficult to implement in distant water fisheries due to the fact that employment takes place in extremely remote ocean areas. It would be an extreme interference with the operations of fishing vessels to require that such vessels visit shore facilities for purposes of random testing. The suggestion that concerns of the industry with sampling can be cured through the use of associations or unions simply does not recognize the problems which would be faced by distant water fishing fleets in the accomplishment of such a program. The requirements are simply impractical because of the cost involved in transporting personnel and samples to facilities capable of performing tests according to HHS standards.

With regard to reasonable cause testing, we believe the vessel owner should maintain responsibility for establishing testing policies on the vessels. The vessel owner is not only more knowageable when it comes to the crew and the fishery, but takes responsibility for liability exposure associated with potential lawsuits from adversely affected employees.

Pre-employment testing can create problems in crewing vessels on short notice. The safety of a vessel can be placed into jeopardy by sailing with a short crew whether it is a result of not being able to fulfill pre-employment testing requirements or of having to discharge crew after positive testing. Full manning is a high priority and vessel owners should be allowed sufficient flexibility to hire replacement crew before putting the vessel's safety at risk.

Finally, with regard to rehabilitation, NFI supports option four which does not mandate rehabilitation but allows vessel owners to offer such programs as deemed appropriate. If the programs are required, they should be funded at government expense. Furthermore, vessel owners should not be required to hold open crew positions for rehabilitated drug users. Filling temporary positions with competent personnel is most difficult and could impact on the overall safety of the vessel.

Many of the arguments advanced in support of the proposed rule relate to the transportation industry. The fishing industry is a very much different and separate industry from the merchant marine industry. It is not logical to assume what may be appropriate for merchant marine vessels automatically transfers to the facts surrounding our industry. Fishing vessels are not common carriers. We are a food industry which uses vessels as harvesting and processing platforms.

Even within our industry, the characteristics of each fishery vary considerably. The menhaden fishery is pursued in coastal waters as a day fishery, while the tuna and North Pacific groundfish fishery operate in distant waters for extensive periods of voyage. Post accident testing is more common in the menhaden fishery because of its ability to test samples on shore. As previously mentioned, similar testing is impractical for the distant water fisheries.

We believe that while it may be appropriate to provide for regulations which bar the use of drugs and alcohol by vessel employees, the Coast Guard must leave the means of achieving that goal to the companies which operate the vessels. Regulations of the federal government cannot be tailored to the multitude of work place environments to which they would apply.

In summary, NFI does support the objectives of the proposed drug testing regulations. However, as written, the rules are impractical for our fisheries due to constitutional, legal, economic, manning and safety concerns. We strongly recommend that the Coast Guard continue to work with the industry in developing drug testing guidelines that could support private initiatives aimed at drug and alcohol abuse.

We appreciate the opportunity to submit comments and would be happy to provide further information.

Submission of the National Marine Engineers' Beneficial Association, the Seafarers International Union of North America, the International Organization of Masters, Mates & Pilots, and the Inlandboatmen's Union of the Pacific Regarding Drug Testing for U.S. Merchant Seamen

On behalf of the National Marine Engineers' Beneficial Association, the Seafarers International Union of North America, the International Organization of Masters, Mates & Pilots, and the Inlandboatmen's Union of the Pacific, we are pleased to have this opportunity to discuss the Coast Guard's regulatory proposal establishing testing requirements to detect drug and alcohol usage among merchant vessel personnel, as published in the Federal Register on July 8, 1988.

As individuals, we share this nation's concern and are sympathetic to the continued drug problem which has plagued American society. As the representatives of thousands of licensed and unlicensed merchant mariners employed on American vessels plying our nation's domestic waterways and international sealanes of the world, we are committed to the highest standards of safety and a drug-free working environment. Our position in this regard does not differ from that of the Coast Guard or of Congressional members who have expended numerous hours of debate on initiatives to realize a drug-free society. Although we are supportive of the goal to achieve a drug-free society and working environment, we, nonetheless, must question the validity of the Coast Guard's assumption that such a problem exists in the maritime sector, the constitutionality and legality of the Coast Guard's recommended means for achieving that end result, and the unprecedented haste in which such a complex issue is being pursued by the agency.

In its proposed rulemaking, the Coast Guard has admitted that agency "data do not specifically identify the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage" and whatever data is available is "sparse and not conclusive." Nevertheless, the Coast Guard has proceeded in significant haste to propose a regulatory regime to correct and deter a problem which essentially it has no factual evidence to prove exists. The absence of a causal link between the use of drugs and the occurrence of accidents would appear to contradict this agency's perceived justification for an intrusion into an individual's right to privacy. This lack of justification was the principal reason behind the recent decision in Harmon v. Meese resulting in a preliminary injunction enjoining the implementation of mandatory random drug testing under the Department of Justice Drug-Free Workplace Plan.

In 1928, U.S. Supreme Court Justice Louis Brandeis wrote that the right to privacy is "the right to be let alone -- the most prehensile of rights and the right most valued by civilized men." In this statement, Justice Brandeis was referring to the Fourth Amendment's guarantee against "illegal searches and seizures" by government. Drug testing may be viewed as an intrusion in the right to privacy and a violation of the constitutional prohibition against self-incrimination and unreasonable search and seizure once the government requires employers to test workers for drugs. Courts universally have ruled that urinalysis or blood testing for substance abuse without reasonable cause constitutes a search under the Fourth Amendment. According to case law, a search is reasonable if it "was justified at its inception" and a search is justified at its inception when "reasonable grounds exist for suspecting that the search will turn up evidence of work-related drug use." As heretofore noted, the Coast Guard itself concedes that it does not have the factual data to demonstrate that illegal drug use is in fact a problem in the maritime sector, thus lacking the reasonable cause criteria for testing.

Aside from the fact that the proposed rulemaking may conflict with individual privacy rights protected by the Constitution, it also raises issues of fairness and evenhandedness in the treatment of employees. Testing can be used to discriminate against and harass individual employees; while sanctions can be punitive and unfair to employees. Inaccurate test results from faulty procedures of laboratories and their uneven regulation can damage an employee's career and be stigmatizing. Furthermore, other interests are also implicated in drug testing. For example, case law has demonstrated that "because drug tests often furnish information about employee activities occurring outside of working hours, such tests may provide employers with a periscope through which they can peer into an individual's behavior in his private life, even in his own home." After all, testing is only indicative of the fact that intoxicants may have been consumed; they cannot measure impairment or the actual time of consumption. In the proposed regulations, it would appear that the employer would be responsible for ensuring that the employee is drug free even during the latter's off-duty hours. This is grossly unfair to the employer who at this point becomes an arm of the law -- a surrogate police officer -- as well as to the employee whose right to privacy is violated.

For eight years, the Administration has repeatedly professed its belief that government should not meddle in the affairs of the free enterprise system. Nevertheless, having failed to remove or eradicate the supply of illegal drugs, the Administration is now interfering in the private sector by putting the job of drug enforcement and rehabilitation on the backs of the employers -- at an exorbitant cost. Many operators must compete against low cost foreign operations. In this economic and uncompetitive environment, the Administration would heave yet another financial burden on the shoulders of the industry -- a tab too high to pay -- to resolve or deter a drug problem which may or may not exist in this industry. This industry is being asked to sign a blank check based on assumption and conjecture. Therefore, prior to being asked to embark on this new voyage, every effort should be expended to explore in detail the full costs associated with an anti-drug program.

The estimated cost for this regulatory package is $62 million. As indicated by industry representatives, however, the tab for the Coast Guard drug abatement program would be approximately 200-300% higher than that estimated by the agency. If this tremendous cost actually resulted in increasing safety aboard ships by eliminating drug and alcohol abuse, there might be an argument for implementation. But absolutely no data is provided to indicate a problem of drug abuse in the industry. The Coast Guard assumes since there is a problem in society, there must be one aboard ship. Assuming for a moment that there is a problem, the proposed regulations are not the solution. By the Coast Guard's own data, zero use is never achieved through drug testing programs.

Neither does the Coast Guard separate available casualty statistics among the different modes and flag vessels within the maritime sector. The Coast Guard itself acknowledges that the statistics presented are not broken down according to ship type, size, or trade; nor do they specify whether U.S. seamen or sailors on foreign-flag vessels in American waters were at fault in any of the instances of marine casualties reported. Nevertheless, according to the proposed rule, U.S.-flag shipping companies would be expected to pick up the tab on testing and rehabilitation, even though 95% of all U.S. export and import cargo is carried on foreign-flag vessels. These foreign-flag vessels would not be burdened by these regulations or its formidable cost. We can only conclude in this case that the proposal discriminates against U.S.-flag vessel operators and contend that the proposed regulation is inequitable and unfair.

If the Administration insists on a mandatory drug abatement program, we submit that all foreign-flag vessels while in U.S. waters -- especially foreign-flag cruise ships embarking from U.S. ports -- be included in the proposed rulemaking. When the proposed rulemaking applies equally across the board to all types of vessels and all crewmembers transiting or plying U.S.

waters, including recreational boaters, only then will the nation be assured that its waterways are not a threat to public safety resulting from illegal drug use -- the purported goal enunciated in the Coast Guard's policy statement. After all, U.S.-flag commercial vessel traffic is minimal when compared to the number of foreign-flag vessels which take advantage of the U.S.-foreign trade and which carry the major portion of this nation's waterborne cargoes. Furthermore, many foreign-flag vessels have been utilized as a conduit for the shipment of illicit drugs into the country.

In fact, the maritime industry is currently undergoing extensive scrutiny for drug use and trafficking by the U.S. Customs Service. Agency officers board all flag vessels entering U.S. ports. These vessels are subject to random and intensive searches. As newspaper accounts indicate, where Customs agents have detected illegal drug trafficking on merchant vessels, they have impounded the drugs, detained the vessels, and levied significant financial penalties on operators who, in many cases, were unaware that their vessels were being utilized as a channel for the transport of illegal drugs. There exists no differentiation between U.S. and foreign-flag vessel operations in Customs Service inspections. All vessels are boarded and when drugs are discovered, operators are equally penalized -- irrespective of the flag they fly. This appears to be a more equitable and indiscriminate way to enhance the public safety and protect our ports and waterways from the impending dangers of illegal substance abuse and trafficking.

Not only is a government enforcement entity currently policing the entire maritime sector for illegal drugs at U.S. ports, but operators themselves are expending time and effort to ensure that their vessels maintain drug-free operations. Crewmembers likewise are cognizant of the danger of illicit drug use aboard a vessel. Due to crew reductions and the subsequent dependence of merchant mariners on one another for their safety and wellbeing, this brotherhood of the sea is intolerant of the use of illegal drugs by individuals who may jeopardize the life of others in this unique and self-sustaining workplace environment. Therefore, it would appear that the self-policing practices of the industry itself -- among mariners and operators alike -- and Custom Service vessel boardings in U.S. ports would negate the assumed need for yet another layer of federal requirements in the form of the proposed regulations on substance abuse.

The proposed regulations do not consider the great differences that exist in the maritime industry. It appears that they were developed for modes of transportation where work forces are concentrated at certain hubs and employees are accessible to their employers on a regular and routine basis. In this industry, many workers are transient. When ready to ship out, they appear at a hiring hall and take the first job available. Shipping companies, not wishing to have idle employees on the payroll, do not request replacements until the day before they are needed. Whatever steps must be completed prior to joining the vessel must be accomplished in an extremely short period of time. When an individual leaves a particular ship and employer, he simply waits for an opportunity with a different employer.

The proposals, nevertheless, give absolutely no consideration to this unique employment process. Throughout the discussion on the proposals, various assumptions are made concerning the employer/employee relationship, pre-employment physicals, etc., which demonstrate to those familiar with the maritime industry that the proposals were not tailored for its diverse needs. A great deal of further study must be done in order to determine what sort of procedures and methods can be adapted successfully and economically for this industry which cannot afford a shoot from the hip application of shoreside methods.

Our concern with the rulemaking is further exacerbated by the fast track procedure which is being utilized to position this proposal into implementing regulations. One is left with the clear impression that the proposed regulations are in fact a fait accompli with request for comments a procedural necessity. In fact, because of the magnitude of the subject matter, its broad economic and legal ramifications, and the significant number of questions raised within the proposed rulemaking itself -- 62 assumptions, 85 questions, and 37 requests for comment, the latter should have been presented to the industry in the form of an advanced notice of proposed rulemaking with a sufficient time period to ascertain its impact on the industry. With the exception of mass transit and the maritime sector, the major transportation modes were in fact accorded that consideration. Drug testing regulations for mass transit respond to the hue and cry which resulted from the loss of life from an unfortunate rail accident. No such problem has been demonstrated within the maritime industry.

Furthermore, it is expected that the U.S. Supreme Court in its next term will review several cases dealing with this issue and is likely to establish guidelines if drug testing programs are constitutionally acceptable. As you know, the Omnibus Anti-Drug Act of 1988 is also scheduled for floor consideration in the very near future. As with the cases pending review by the U.S. Supreme Court, the Congress should also be given the opportunity to consider its initiatives which may or may not impact the nation's transportation network. The expected Supreme Court decisions in RLEA v. Burnley and NTEU v. von Raab or Congressional action in this session may in fact invalidate the Coast Guard's proposed rulemaking or require substantial modifications. Furthermore, the status quo should be maintained given the recent decision in Harmon v. Meese in which the Court saw no urgent need from the facts presented by the Justice Department to implement a drug testing program by a specific date. We contend that this rush to judgment should be stopped until the economic, legal and administrative impacts of this proposed rulemaking are thoroughly researched.

As noted, the Coast Guard's regulatory effort and its methodology to eliminate unsubstantiated drug and alcohol abuse in the maritime sector raises many legitimate areas of concern within the industry. Aside from imposing a burdensome cost and responsibility on the employer to comply with the proposed regulation -- in effect placing the private sector in the untenable position of acting as a surrogate law enforcement officer, the proposed regulation may provoke civil liability suits against employers or labor organizations who attempt to abide by the anti-drug regulations and carry the agency's dictates. The associated unknown costs resulting from civil liability suits arising from this extraordinary initiative may be virtually unlimited and devastating to the industry. Therefore, any drug abatement program initiated by the federal government should absolve the industry from anticipated liability problems.

Further, while four rehabilitation options appear in the proposed regulations, they are in our view inadequate as drafted. Merchant mariners, boatmen, fishermen, offshore and other maritime industry workers who are members of a collective bargaining unit are normally afforded the opportunity for rehabilitation if the need arises. However, noting the fact that a major portion of the Coast Guard estimated cost falls within the rehabilitation category, it is conceivable that many employers who are not bound by collective bargaining agreements may be unable to or will decline to provide this important part of the anti-drug program to their employees. As a result, unorganized maritime workers may not receive the benefits of a rehabilitation program. If the goal of this program is to eliminate drugs from the workplace permanently, then a comprehensive rehabilitation program must be concurrently established so that any maritime worker afflicted with a drug problem can be treated and restored to health.

The importance of the rehabilitation process to the ultimate success of the federal government's anti-drug efforts cannot be overemphasized. For without the opportunity for a rehabilitated worker to regain a productive economic status, many recovered addicts will simply face overwhelming personal pressures that will undoubtedly result in a return to drug dependency. This would simply result in a mere transfer of occupational drug problems from one industry to another without eliminating the root cause of this scourge confronting the nation.

In conclusion, we urge the committee and the Congress to work with us to persuade the Coast Guard not to implement its proposed rulemaking regarding drug testing. Instead, the Coast Guard should note all of the problems we have cited with its proposed program and give the industry a reasonable time frame in which to analyze and ascertain the economic impact of any federally mandated drug abatement program and to propose constructive, specific alternatives. Any drug program must be reasonable, equitable, and fair. It should also apply to all vessels that enter U.S. waters, not just U.S.-flag vessels; it should provide constitutional safeguards and procedures and ensure fairness to the seafarer; it should impose minimal economic and fiscal impact on an industry which is already in dire financial straits -- as well as a minimal administrative burden while assuring the public that mariners aboard commercial and recreational vessels enjoy the benefits of a drug-free and safe environment.

Thank you, Mr. Chairman.

STATEMENT ON BEHALF OF AMERICAN MARITIME ASSOCIATION

SUBMITTED BY MARTIN C. SEHAM, GENERAL COUNSEL

We are pleased to have the opportunity to present our views to the Committee in connection with its inquiry concerning measures to be taken to curb and eliminate drug use in the maritime industry. These comments are submitted on behalf of the American Maritime Association, an organization of American flag ship owners and operators established to deal with labor management relations affecting member companies. As of this writing, AMA probably represents the largest number of union contracted vessels operating under the American Flag.

We all understand that there is now pending before the Coast Guard a Notice of Proposed Rulemaking which suggests standards and procedures for drug testing in the maritime industry to be imposed on a comprehensive basis. In light of the pendancy of that proceeding, we are especially pleased to have the opportunity to bring our views to the Committee's attention. The reason for that pleasure is that the Committee and the larger body of Congress has the ultimate burden of serving the total national interest and acting to preserve a viable American merchant marine. We acknowledge that no group in this country knows better the perilous economic position in which the maritime industry finds itself than the member of this Committee. While there certainly is a national drug problem of substantial proportions and there may be problems of drug abuse by mariners, it is this Committee's responsibility to make certain that a worrisome problem is not converted to a national disaster.

The pending Coast Guard proposals would impose a cost burden on the industry in excess of 63 million dollars. The shrinkage in the industry has deprived us of the economies of scale and the ability to spread this enormous cost burden among large numbers of healthy companies. The actual economic situation in which we find ourselves reflects only a relatively few remaining companies, some of them failing, and all of them keeping but a tenuous hold on economic survival. There is no question but that the imposition of this additional cost burden would be sufficient to push more than one company over the economic abyss. This Committee must do everything in its power to prevent this. It would certainly be an anomaly worthy of ridicule to find an agency of government blindly adding the last straw to the camel's back while this Committee and others concerned with national security struggle to maintain the semblance of an American flag fleet.

We do not mean to suggest that mariners are immune to drug temptation or wholly innocent of drug abuse. However, there has been no outbreak of abuse or incident which warrants a heedless and hasty remedy. Certainly, the proceedings held so far have not indicated that the Coast Guard has taken into account at all the consequences that its program would have on the economic health of the industry. Hearings must be held to explore all aspects of any proposed drug testing program. If it is decided that some program should be instituted, it must be tailored to the resources available. Those resources should, of course, include the prospect of Federal financing for a federally initiated program. Appropriate evaluations should be given to the effectiveness of company programs already in effect. An evaluation should be made of the facility resources that have been developed by the unions and through the collective bargaining process. Special concern must be given to the problems of smaller carriers, sometimes operating only one or two ships, who clearly cannot maintain their own testing programs at the variety of ports where they may sporadically call. In this rush to judgment there has simply been no opportunity for the Associations representing carriers to meet with each other and consider whether joint programs could not be devised.

As bad as the drug problem is among some sectors of our society, there has been no showing that it constitutes an immediate crisis for the safe operation of the American flag fleet. There is, however, an immediate crisis that does exist and that is the economic survival of the industry. We urge this Committee, the Coast Guard, and any other agency involved to proceed, by all means, with the development of a program which would detect and prevent drug abuse. However, if the program is to succeed and if it is to have an industry within which it can operate, that progress has to be on an intelligent, considered, and effective basis. In an industry as complex and fragile as the one this Committee oversees, solutions to complicated problems cannot be based upon fiat and good intentions alone. We respectfully urge the Committee to recommend to the Coast Guard that it defer any action on the pending NPRM until such time as there have been full evidentiary hearings which will consider, among other things, the economic resources available to sustain any particular program.

We have made certain additional comments in our presentation to the Coast Guard and we are attaching them to this Statement as a further expression of AMA's views on the subject at hand.

I want to thank the Committee for the opportunity of presenting our views on an issue that could affect the viability of an American merchant marine which is so vital to our national security.

Dated: September 16, 1988

Respectfully submitted,

AMERICAN MARITIME ASSOCIATION

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COMMENTS OF AMERICAN MARITIME ASSOCIATION

NOTICE OF PROPOSED RULEMAKING ON PROGRAMS FOR CHEMICAL, DRUG AND ALCOHOL TESTING OF COMMERCIAL VESSELS' PERSONNEL

CGD-8607

Dated: August 30, 1988

COMMENTS OF AMERICAN MARITIME ASSOCIATION

NOTICE OF PROPOSED RULEMAKING ON PROGRAMS FOR CHEMICAL, DRUG AND ALCOHOL TESTING OF COMMERCIAL VESSELS' PERSONNEL

These comments are submitted by the American Maritime Association in response to the invitation for comments contained in the Notice of Public Rule Making, Federal Register, Volume 53, No. 131, July 8, 1988. American Maritime Association is a trade association of American flag shipping companies organized for the purpose of conducting negotiations and other labor relations functions with various maritime unions representing shipboard personnel. The Association constitutes the industry wide bargaining unit for the Seafarers International Union but it is also active in the administration of contracts with other maritime unions as well. Included in its membership are companies owning and operating an aggregate of some 80 ships.

The entire focus of the American Maritime Association is, therefore, directed to the efficient, economical, and safe utilization of personnel. As a consequence, American Maritime Association has been active in the prosecution of disciplinary cases involving the misuse of alcoholic products. It, therefore, brings to this proceeding a special experience with the problem at hand.

The Financial Incapacity of the Industry to Pay for the Proposed Program

The overriding issue raised by this Notice is the ability of a thoroughly debilitated American flag maritime industry to absorb an economic body blow administered by its own protectors. The proposed program is not an academic exercise or a hypothetical excursion; it has all the reality of a $62 million cost burden which the industry cannot absorb.

When we say the issue of economic capacity is the overriding question, we do not confine our concerns to the shrunken pocketbooks of the companies themselves. We are talking about the impact on an industry which has become a national disaster and whose condition has become a threat to the very security of this Nation. There need be no hearings on these truths because they have become of such obvious concern that Congress enacted legislation providing for the appointment of a Commission on merchant marine and defense. That Commission has held numerous hearings and received mountains of evidence that has led to the issuance of two reports, the latest being dated December 30, 1987. Chapter 1 of the second report begins with the heading, "The Crisis in the Maritime Industries". It goes on to say, in pertinent part:

> "In its initial report dated September 30, 1987, the Commission concluded that America's maritime industries -- the merchant marine, the shipbuilding and repair industries -- are vital to the national defense of the United States, but that their capability for that purpose is currently inadequate and is deterioriating rapidly. The Commission's analysis has been widely supported, and the Secretary of Defense has also brought the urgency of the situation to the attention of the nation's highest national security authorities.

> The First Report of the Commission on Merchant Marine and Defense states that:
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> -- There is today insufficient strategic sealift, both in ships and trained personnel, for the United States, using only its own resources as required by defense planning assumptions, to execute a major deployment in a contingency operation in a single distant theater such as Southwest Asia;
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> * * *
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> -- The United States merchant marine now carries only about four percent of our oceanborne commerce and, if current trends continue, that percentage is expected to shrink to about one percent by the year 2000;
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> -- The United States flag commerical fleet declined from 843 ships in 1970 to only 369 active ships at the beginning of 1987. Unless immediate measures are taken to reverse the downward trend, the number of active vessels is projected to decrease to about 220 by the year 2000;
>
> -- The United States seagoing merchant seaman workforce has declined by nearly 60 percent since 1970, to its current level of 28,000. Unless the trend is reversed, the merchant seaman workforce is expected to shrink to 12,000 by the end of the century. The remaining seamen would be insufficient to operate the active merchant marine, reactivated Ready Reserve Force ships, and the other units of an expanded strategic sealift fleet;"

The latest reported figures indicate that oceangoing employment in the privately owned fleet has fallen to 10,611 jobs. Since the report was written, we have seen the bankruptcy of United States Lines, the largest single American flag carrier.

The first report of the Commission, September 30, 1987, (p. 33-34), more specifically on the growing disappearance of American seaman from the high seas:

> "Declining by nearly 60% since 1970, the number of American mariners who sailed at least one day during the year on an oceangoing United States flag merchant ship of 1,000 gross tons or greater totaled only 28,000 in 1987, filling 12,700 seagoing billets.
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> * * *
>
> Using the fleet projection for the year 2000, the Commission calculated the projected number of billets and the size of the seagoing workforce. The number of licensed and unlicensed seamen is projected to decline to 12,000, based on 6,000 billets, a decrease of more than 50 percent from the current level.

> During peacetime, the seagoing workforce reacts to the availability of billets and, historically, stabilizes at about 2 mariners per billet. The opportunities for seagoing billets set the size of the workforce, which is regulated principally by the size of the active merchant fleet. In general, for each billet lost, the active maritime workforce declines by 2 seamen.
>
> With the reduction in the number of seagoing jobs, employment priority is given to those who have tenure or seniority. Maritime labor unions cannot place everyone who desires a seagoing position and have restricted additions to their membership rolls in recent years."

One result of the decline in the fleet and the consequent decline in the number of billets is the fact that the largest age group servicing all American flag ships is 56-60 years old and the second largest group is 61-65.

The Special Characteristics of the American Maritime Industry

One of the most prominent characteristics of the American maritime industry is its impoverished state of decline. However, there are other features that distinguish it from enterprises that have been considered for chemical testing programs.

A prime point of comparison would be with the airline industry. To begin with, that industry is a profitable one, notwithstanding the difficulties of some individual companies. Beyond that, the airlines are operating out of centralized bases or hubs where there are concentrations of flight and ground personnel who can be readily covered by a drug testing program. Even the smallest air carriers have workforces in the several hundreds and the larger carriers have employees numbering the scores of thousands. The operations of airlines are predictable and, in fact, scheduled. All this means that the airline industry is capable of establishing testing facilities in specific locations that can administer the needs of groups of airlines and thousands of employees at designated testing facilities. Many of the airlines themselves maintain sophisticated medical departments at these locations which can facilitate the establishment of testing programs.

In contrast, the American flag shipping industry is characterized by the limited numbers of employees servicing highly capitalized equipment at varying and often remote locations. A number of the companies in our own Association operate only one or two vessels. The combinations of these considerations makes it virtually impossible for a single company to provide its own testing program and makes even the coordination of testing efforts an economically problematic one at best. The tidalwave of popular sentiment against the abuse of drugs should not heedlessly sweep us into a program in the maritime industry which is disproportionately costly and practically inappropriate to the characteristics of this industry.

The Need for Further Hearings

If it is decided that a governmentally mandated program should be imposed, further hearings should be held specifically directed to questions of economic burden and administrative effectiveness. The Government cannot simply decide that there is a nationwide drug problem and, therefore, dump $62 million in costs on an ailing industry. The basic "cost/benefit analysis" must be engaged and explored. No program can be based on generalized "national" concerns but must be geared to specific industry problems and characteristics. With a program so defined, attention can then be given to the manner in which the program can be administered economically.

There are possibilities of facilitating a program through the utilization of existing institutions operated by the various maritime unions and their benefit plans. Suggestions have been made to the effect that company associations could have a role in coordinating and administering testing programs. The place occupied by smaller carriers who do not currently participate in either union or association activities has to be examined. The technical/medical problems of protecting the integrity of samples taken at a variety of unscheduled, remote locations have to be anaylzed and resolved.

In each instance, decisions as to the details of the program have to be weighed against both the needs of the industry and the economic impact. For instance, if random testing were adopted, considerations of economy should lead to a 12.5% testing scheme rather than the 125% alternative. The attraction of randomness lies in the uncertainty which faces the person to be tested. A one in eight chance that a seaman will loss his papers and destroy a career should be quite a substantial inducement for him/her to abstain -- and that is the real goal. Thus, if in any particular aspect of the program a goal can be substantially realized at a significantly reduced cost, the economical procedure should be used.

The Industry's Current Efforts

Maritime alcohol abuse has been with us literally forever. It began with Father Noah who, had too much of the grape, slipped and fell off the gangplank on Mt. Ararat. Presumably, his Superior Officer had not administered an adequate screening test before letting Noah assume command of the Ark. Notwithstanding this early failure, the industry has, from sailing days to date, met and dealt with the problem. The statistics offered in the NPRM of casualties attributable to the use of intoxants must, in the main, necessarily depend upon reportage and verification by the companies themselves and reliance on the traditional sensory perception means of determining the individual's condition. Our Association regularly, if not frequently, encounters incidents in which an intoxicated seamen is removed from a vessel or subjected to disciplinary action because the company, through its officers and by traditional means, has detected substance abuse. Certainly, it should be open to the Coast Guard to strengthen the hand of the companies in their own efforts to deal with the problem. There have, for instance, been arbitration decisions in which it has been found that the seaman was intoxicated but the arbitrator has nonetheless imposed discipline less than discharge. A rule mandating the discharge remedy following a finding of substance abuse would aid in the companies' own enforcement efforts. Similarly, the companies are at a disadvantage in screening job applicants because of the rotary hiring hall systems that are prevalent in the industry. Unlike shoreside industries, a seamen dispatched from the hiring hall does not carry with him his disciplinary employment record for review by the new hiring company. A registry providing information concerning the seamen's past conduct would strengthen the companies' ability to withhold employment from those who have been guilty of substance abuse and not successfully rehabilitated.

Conclusion

It really makes no difference that other transportation industries subject to the DOT's jurisdiction are being considered for comprehensive drug and alcohol testing requirements. Ships don't fly, planes don't float and trucks do neither. Each industry is unique and carries with it its own problems, dangers, and opportunities. The greatest danger facing the American maritime industry today is extinction. Certainly the Government should do nothing in these proceedings to hasten such a tragic day.

Dated: August 30, 1988

Respectfully submitted,

AMERICAN MARITIME ASSOCIATION

By: Martin C Seham Esq.
Martin C. Seham, General Counsel
485 Madison Avenue
New York, New York 10022

SEP 19 '88 14:14 IUC P.2

ADC ASSOCIATION of DIVING CONTRACTORS Communication · Education · Safety
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Jerry Reuhl

September 9, 1988

record

Honorable Walter B. Jones, Chairman
U S House of Representatives
Committee On Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, D. C. 20515-6230

Re: Oversight Hearing of the Administration's
Policy of Testing Merchant Seamen for
Drugs - September 22, 1988

Honorable and Dear Sir:

As President of the Association of Diving Contractors, I would like to be put on record that we affirm our interest in this policy to test merchant seamen for drugs. Although we, as divers, do not recognize that we are crew members/merchant seamen, we have often been identified as such under the Jones Act.

We would like to know if the guidelines which will be applied to seamen can be or will be extended to divers?

Our profession is one where clear thinking is indispensible to insure the safety of our people and we would like to be able to dismiss drug offenders from our ranks.

Please keep us up to date on this very important matter.

Very truly yours,

Andre Galerne
President

correspond directly with the President, please write to:
IUC, 222 Fordham Street, City Island, N Y 10464

RECORD STATEMENT BY THE NATIONAL OCEAN INDUSTRIES ASSOCIATION BEFORE THE SUBCOMMITTEE ON MERCHANT MARINE, 22 SEPTEMBER 1988

The National Ocean Industries Association (NOIA) is pleased to submit comments relative to the U.S. Coast Guard's proposed rulemaking on Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel (53 FR 25926). These comments supplement the statement presented at the September 22, 1988 hearing of the Merchant Marine Subcommittee at which Bill S. Person, Manager of Industrial Relations, Rowan Companies, Inc., testified on behalf of the International Association of Drilling Contractors and the drilling contractor members of NOIA.

NOIA is a trade association of more than 325 member companies with operations in all fifty states and the District of Columbia. Our members include companies -- large and small -- involved in marine, offshore, and ocean work. Thus, the membership includes operators of mobile offshore drilling units, geophysical survey vessels, service and supply boats, and offshore oil and gas producers.

Given the diversity of NOIA's membership, it is not possible to develop comments on all aspects of the proposed rule which represent a consensus of the offshore industry. However, we find it necessary to address certain fundamental policy issues which must be resolved if the Coast Guard is to promulgate rational public policy in this area. NOIA was one of the first maritime industry trade associations to suggest that its member companies pay serious attention to drug abuse aboard vessels. In 1982, NOIA published a booklet alerting our members to the need for drug abuse prevention offshore. Our drug abuse policy, issued in 1987, encouraged member companies to take appropriate steps -- including urinalysis-based drug testing -- to eliminate the use of drugs at offshore work locations. Several NOIA member companies presently use urinalysis-based drug testing to some degree. Other companies undertake searches often aided by drug sniffing dogs to locate contraband aboard the vessel. We know of no company which ignores the intimate relationship between safety and prevention of substance abuse.

NOIA established a drug use policy to guide its member companies in voluntarily implementing programs which are appropriate to the nature of their operations. In addition to our goal of attaining a safe working environment, we also hoped that by encouraging voluntary programs, we could discourage inflexible regulation. Regrettably, the proposed rule deprives each of the industry segments the flexibility to design an appropriate program. We must oppose it for this reason.

NOIA believes that the proposed rule is impractical and ill conceived. It will interfere with mature, non-discriminatory testing programs established by some of our member companies. Typically, these companies select an entire facility for testing and all personnel aboard that facility on the day in question are tested. The proposed rule would no longer permit this practice and instead would require that individuals be randomly selected by computer for testing. As a practical matter, this could force a drug testing team to travel to a remote offshore facility in search of a single individual whose name came up on the computer but who may not even be working that day. The suggestion that employers test 125% of their employees per year will substantially increase costs to those companies which presently undertake drug testing. Needless to say, the proposed rule, if implemented, would require major changes in effective programs.

Other member companies have chosen not to implement urinalysis-based drug testing. They have selected other drug abuse prevention approaches. The proposed rule would require that these approaches be abandoned without any evidence that they have failed to live up to their expectations. In place of these approaches, the Coast Guard would require operators to underwrite more costly urinalysis drug testing. Based upon the experience of companies which have voluntarily adopted random drug testing, sampling and analysis can cost up to $100 per individual. Another $100 per individual may be expended for administrative support of the testing program. This is an expense that many offshore service companies cannot afford to bear.

Conspicuously absent from the proposed rule is any analysis of why the benefits to be attained from urinalysis-based drug testing are greater than those obtained from less costly methods. Indeed, the Coast Guard admits in its preamble that it does not even have a sense of whether drug abuse is a more or less frequently encountered problem offshore than in society at large. The proposed rule merely presumes that drug abuse offshore is a serious enough problem to merit continuous urinalysis drug testing and asks the offshore industry to underwrite the cost of verifying this hypothesis.

The offshore industry believes that the Coast Guard should not mandate that an employer rehire an individual discharged for drug abuse after rehabilitation. Nor do we believe that the Coast Guard should mandate that employers pay the cost of rehabilitation. Many employers have voluntarily established employee assistance programs. However, the decision on whether to do so should rest with the employer. The Coast Guard clearly lacks the authority to interfere with the employment at will relationship.

The offshore industry lacks the resources to implement the proposed rule. The Coast Guard must be sensitive to the fact that our industry is just now recovering from the worldwide downturn in oil and gas exploration activities. Our companies simply cannot pass along the cost of compliance with the proposed rule to their customers.

We respectfully suggest that the Coast Guard consider an alternative approach to drug abuse prevention to that set out in the proposed rule. Instead of mandating a single uniform program, the Coast Guard should encourage voluntary, employer designed programs. Employers should not be required to conduct urinalysis drug testing if they believe other preventive approaches are adequate. The Coast Guard might require maritime employers to self-certify that they have adopted a drug abuse prevention program but should not prescribe its content.

If the Coast Guard desires to encourage employers to utilize random urinalysis drug testing programs it should undertake to remove what legal impediments there may be to conducting these programs. For example, Coast Guard regulations which prevent an employee from claiming that his privacy was invaded or the employer negligently inflicted emotional distress in taking the urine sample, would be viewed positively by the offshore industry. However, such regulations should not be conditioned on use of the Department of Health and Human Services guidelines since more suitable non-discriminatory standards are available. Employers should also be protected from litigation if reasonable suspicion testing is undertaken in good faith. The Coast Guard should undertake a study of state law and reported cases to determine which impediments can be removed consistent with the Coast Guard's authority to preempt inconsistent state law and precepts of due process.

A voluntary approach might also help to ease some of the discontent which has arisen in all segments of the maritime industry since the proposed rule was released. In this regard, it is worthwhile to consider that the "industry" members of Seafarer's Health Improvement Program (SHIP) Executive Committee, i.e., representatives of vessel owners, labor unions, and maritime medical personnel, unanimously resolved that the proposed rule is impractical, ill conceived, and costly with little time allowed for review and comment. The resolution recommended that the proposed rule be withdrawn pending Coast Guard consultation with the diverse segments of the maritime industry in developing a proper approach to preventing drug abuse in the maritime industry.

There is little question that the Coast Guard and maritime industry need to work together on a cost effective approach to drug abuse prevention. The current proposal fails to strike anappropriate balance among safety, cost, and operational concerns. Whatever incremental benefits may be achieved by the proposed rule are speculative at best and are clearly outweighed by the significant increase in cost. Moreover, the posed rule would reduce the effectiveness of current mature programs.

NOIA requested that the Coast Guard treat the present "proposed rule" as an advance notice of proposed rulemaking. Before proposing a new rule, the Coast Guard should closely review the comments and consult with all segments of the maritime industry to fashion a program which reasonably accommodates the concerns of all involved. NOIA believes that a period of at least six months is necessary to allow the offshore industries to formulate a consensus that would lead to the development of rational public policy.

NOIA appreciates the interest of the Merchant Marine Subcommittee in this most important issue. The offshore industries and NOIA are committed to tackling our nation's drug problem, but we want public policy to be developed in an orderly and rational fashion. We look forward to working with the members of the Subcommittee in our efforts to achieve a drug-free work place. Thank you for considering our comments.

GEORGE J. RYAN *President*
GORDON D. HALL *Vice President - Treasurer*
CAROL ANN LANE *Secretary*

THOMAS O. MURPHY *General Counsel*
GLEN G. NEKVASIL *Communications Director*

LAKE CARRIERS' ASSOCIATION
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915 Rockefeller Building
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September 16, 1988

The Honorable Walter B. Jones
Chairman
Committee on Merchant Marine and Fisheries
1334 Longworth House Office Building
Washington, D.C. 20515

Dear Congressman Jones:

The Association's 14 member companies ask that the enclosure be included as testimony in the official record of the Oversight Hearing on the Administration's proposed rulemaking on drug testing of merchant seamen to be conducted on September 22, 1988.

Thank you.

Sincerely yours,

George J. Ryan

George J. Ryan
President

GJR:GDH:emh
Enclosure

American Steamship Company • Bethlehem Steel Corporation • Cement Transit Company • Cleveland Tankers, Inc. • Erie Sand Steamship Co.
Inland Lakes Management, Inc. • Inland Steel Company • The Interlake Steamship Company • Litton Great Lakes Corp. • M.A. Hanna Company
Oglebay Norton Company • Pringle Transit Company • Rouge Steel Company • USS Great Lakes Fleet, Inc.

SUMMARY OF
LAKE CARRIERS' ASSOCIATION
POSITION ON
COAST GUARD NOTICE OF PROPOSED RULEMAKING ON PROGRAMS FOR CHEMICAL DRUG AND ALCOHOL TESTING OF COMMERCIAL VESSEL PERSONNEL

- Questions of Implied Consent and Privacy Act implications are so critical to the rulemaking that it seems prudent for rulemakers to await results of two cases now before the Supreme Court before hastening through the rulemaking process. Congress should direct the Coast Guard to stay any further action until a review of the Supreme Court rulings.

- No Coast Guard costs are listed. Congress should ask the Coast Guard what their costs are to administer the program.

- When the above rulings are reviewed, the new proposed regulation should have a new definition of "serious marine incident." The current proposal requires a full test scenario for anyone off duty 24 hours or more regardless of circumstances, and this will be administratively burdensome and costly in terms of ship delays. A 72-hour threshold is advocated as within reason.

GDH:EMH
09/15/88

Docket

[illegible] RYAN President
[illegible] D. HALL Vice President Treasurer
[illegible] LANE Secretary

THOMAS O. MURPHY General Counsel
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August 31, 1988

Executive Secretary
Marine Safety Council (G-LRA-2/21)
CGD 86-067
United States Coast Guard
Washington, D.C. 20593-0001

Dear Sir:

These comments pertain to Docket CGD86-067 regarding the Notice of Proposed Rulemaking on Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel.

Lake Carriers' Association represents 14 United States-flag Great Lakes fleets. The 14 member fleets have a combined total of 66 vessels with a per-trip capacity of 1,855,810 gross tons of bulk cargo. These vessels comprise more than 95 percent of the tonnage of United States Great Lakes vessels and approximately 33 percent of all United States self-propelled vessels of 1,000 gross registered tons or larger engaged in the domestic trade. It is estimated that approximately 2,500 employees of our member companies would be subject to the proposed regulation.

This response is divided into three parts. First, I will address general areas of concern to our member companies. Secondly, answers to questions and comments in response to topics in the proposal are provided as enclosure one. Lastly, enclosure one makes several references to labor management agreements. Agreement extracts are provided as enclosure two where they may be helpful in responding to questions and comment requests in the Proposed Rule.

Initially I would like to make it clear that this is a far-reaching undertaking, one warranting more than a 60 day comment period. Our member companies do not appreciate an approach which has all the air of being a closed issue which is being rammed through with highly political overtones. I cannot recall when a topic of this import generated so many requests for an extension of time for comment and had those requests denied by the Coast Guard for no reason except to say that it was time for expediency. The Coast Guard war on drugs and alcohol is doomed to failure when it is guided by base political motives. It is germane to note that a similar rulemaking by the Federal Railroad Administration took two years.

The questions of Implied Consent and Privacy Act implications are certain to be decided in the courts, and it would seem prudent to proceed with the benefit of knowledge derived from the two cases now before the Supreme Court (National Treasury Employees Union et al. vs. Wm. Von Raab; and Railway Labor Executives Association et al. vs. James H. Burnley) instead of opting for political expediency.

Continued . . . /

Court decisions regarding the issue of consent generally find that if the underlying search is unconstitutional, and random searches are generally found to be unconstitutional, obtaining the employee's consent does not render the search lawful and the employee's consent is considered to be invalid. Until the Supreme Court renders a decision in Burnley and clarifies its position on implied consents, existing case law indicates that implied consent will not be recognized for random searches.

Our member companies believe the rulemaking should address the matter of potential conflict with state law. Minnesota Statute 181.950 (1987) currently prohibits testing of the nature envisioned by the Coast Guard, but the authors were forward-looking enough to provide for an exemption which would allow drug and alcohol testing "pursuant to Federal regulations or requirements necessary to operate federally regulated facilities." We question the future course of action in the event a state passes a similar law prohibiting testing without a like exemption. We believe this should be addressed in the rulemaking.

It is noted that in addressing the estimated total cost of the new program, the only estimates deal with costs to industry and make no estimate of increased costs to the Coast Guard to administer this program. Further the costs calculated are for the tests themselves and not for the serious potential for delays to vessels when compelled to comply with the letter of these proposed regulations. Mention is made several times of possible Coast Guard authorization of company specific plans and waivers for company initiatives. Certainly these reviews together with administration of programs of suspension or revocation of merchant mariners documents have some significant associated costs.

Regarding the Proposed Rule itself, our member companies believe the trigger for testing as described under serious marine incident is set too low. To have any crewmember who is rendered unfit to perform routine or emergency duties for however brief a time subject to subsequent testing is clearly unwarranted. We advocate using the present criteria of 72 hours which now requires an accident report as a more realistic approach. To have the testing burden for every minor off duty incident of cut fingers and sprains has the distinct appearance of over-regulation, and it will drive costs up extensively. We are concerned that besides the costs of having individuals tested, the costs of ship delays has been neglected and they will be considerable.

Proposed Section 4.03-5 requires a medical facility to be an American hospital and we don't agree that such a restriction should apply here on the Great Lakes. We believe Canadian hospitals should be authorized. The American restriction as proposed also affects the intent of 4.06-25. The language of 4.06-25 seems to indicate that body fluids in the case of a fatality are not required from a medical facility in Canada because by definition a Canadian hospital is not a "medical facility."

In Section 16.210(f) a requirement exists to report the results of positive chemical tests to the cognizant Coast Guard Officer in Charge, Marine Inspection. Who is this cognizant Coast Guard Officer? Is it the nearest one?

Section 16.205(e) does not state who to notify if a reasonable suspicion test results in a positive. Later Sections detail revocation and suspension action, but there is no description of how you reach that point other than to say it occurs under Part 5. The Coast Guard should provide specific directions as to which Coast Guard official to notify.

Continued . . . /

Other similar Federal programs provide a provision whereby an employee may verify a positive test by having another test accomplished at his expense at an authorized test facility using leftover test fluids. It would seem this provision should be contained in the Coast Guard rule as well.

Some opinions on the matter of Implied Consent and the Privacy Act are addressed in detail in enclosure one, but suffice it to say our member companies believe each is a substantial issue which, when resolved by the Court, may render most of the present rulemaking invalid.

In summary it must be affirmed that our member companies resent that such a substantive and potentially expensive matter is being sacrificed to political expediency. Nevertheless, it is our hope that our concerns will be heard and that America's maritime industry will be allowed substantial latitude in dealing with a major concern of our times.

Sincerely,

George J. Ryan
President

GJR:GDH:emh

Enclosures:
1. Lake Carriers' Association Responses to Questions and Requests for Comments Contained in Notice of Proposed Rulemaking on Drug and Alcohol Testing
2. Extracts from Labor Management Agreements
    - a. American Steamship Company Operating Policies and Practices 13.05-2 and 10.11
    - * b. Freighter Agreement between SIU and Great Lakes Association of Marine Operators; Pages 1-8, 20-22, 41
    - * c. Shipping Rules - SIU
    - * d. Labor Contract, Columbia Transportation/Local 5000; Pages 24, 53-54, 57-61, 81, 86
    - e. Program of Insurance Benefits; Pages 17, 19, 59-62
    - f. Agreement between Columbia Transportation/District 2 MEBA; Pages 13-14, 52-56, 60-61, 81

in Subcommittee Files

* portions only

LAKE CARRIERS' ASSOCIATION RESPONSES TO QUESTIONS AND REQUESTS FOR COMMENTS CONTAINED IN NOTICE OF PROPOSED RULEMAKING ON DRUG AND ALCOHOL TESTING (CGD86-067)

The Coast Guard is interested in comments on ways in which its goals can be achieved through procedures or programs without the need for detailed regulatory requirements. For example, should Coast Guard permit programs developed by consortiums of marine employers that conform with the basic requirements of the following proposed specific program? As noted later in this preamble the Coast Guard is also interested in obtaining comments on the feasibility and effectiveness of having Coast Guard approve company-specific programs that conform with the basic requirements of the proposed program.

The Association would respond that the general tenor of the entire rulemaking is that "Only Big Brother Can Save You." This is a poor assumption. An industry struggling to stay competitive has to be more interested in reducing the costs of marine casualties than the Federal government will ever be. Using the accident and dollar totals listed on page 25927 appear to be totally extraneous because they are believed to roll commercial vessel and recreational vessel casualties together with no indication of how either has contributed to the gross totals. We surmise that the preponderance of those totals come from the recreational category. We respond that of course programs developed by employers conforming with the goal of reducing alcohol and drug abuse aboard vessels should be approved, and furthermore, they should supplant the "one size fits all" approach advanced in the Rulemaking. It is important that such latitude be allowed initially, for if only the Federally imposed solution is initially sanctioned, there will be little or no incentive to provide effective alternatives by industry. However, if industry is given latitude initially to establish its own alternatives, two yardsticks will be available to measure the success of the Federally imposed vs. the industry alternative(s).

The Coast Guard invites comments as to which additional drugs, if any, should be included.

The Association does not advocate testing of any additional drugs.

Because of the scheduled nature of periodic testing, comment is requested concerning its effectiveness. Should this type of testing be a part of all future drug programs, or should it be phased out after several years when the other forms of testing are established and working smoothly.

As concluded in the preamble periodic testing is likely to detect only the dependent drug user. To date none have been detected through periodic physicals given in the Great Lakes industry. For someone already on the employment rolls it is considered much more likely a dependent drug user would be detected as the result of a probable cause test. Consequently we see no value in periodic testing, now or in the future. Benefits are not projected as exceeding costs.

The Coast Guard specifically invites suggestions by unions, associations, or other organizations for alternative testing programs that would provide adequate assurance to employers that a prospective employee is not a substance abuser . . . . Comments on how to address this issue (short-lead time hire of replacement crewmember to enable vessel to sail) are specifically invited.

In instances of pre-employment testing, member companies have had occasions where applicants test positive so, as a means to eliminate users, be they casual or dependent, this industry, for the most part, contemplates continuing pre-employment testing.

However, in spite of efforts to maintain lists of physically qualified applicants for different jobs in several ports around the Lakes, a sailor is sometimes required to join a vessel without a prior physical. This alternative must remain viable on rare occasions or extremely costly vessel delays may result. Regulations must be flexible to recognize this situation and allow 10 days or so to obtain the pre-employment physical and test results. It must further be recognized that there is not previous testing on which to rely.

Section 16.205(b) proposes that an applicant undergo a urinalysis at the time of application for work. Since an applicant could be on a waiting list for employment for up to a year or more, the urinalysis result would have little or no bearing on his being drug-free when hired. Most of our member companies order a physical on a man when he nears the top of the waiting list. This seems to meet the goal of the proposed rule.

If an applicant consents to making available the results of a recent periodic test, that should be acceptable. However, under the Privacy Act, the applicant need only make available a result that is favorable to him.

There is another area that seems unaddressed by the proposed regulation. Certain of our member companies support a Sailors Job Referral Center where sailors with a document (or sailors to be who have never sailed before) apply for work and may be placed on waiting lists for unlicensed ratings. Those applicants have no employer until their name comes to the top of their list and they are referred to a company requesting a given rating. Thus the applicant could undergo a urinalysis and test positive and the Coast Guard would not be notified under the Coast Guard's proposal because at this point there is no employer. Moreover, the same applicant, a month later, could be hired by a company not subscribing to the Sailors' Job Referral Center and test clean. I believe the Privacy Act is an effective bar to this exchange of information.

The Coast Guard requests comments on a range of possible annual testing rates up to 125 percent for random selection.

The majority of Association members oppose random testing. It is thought to be an unwarranted invasion of privacy and a serious breach of trust between the employer and employee. Effective employer/employee relations programs are built upon mutual trust and respect, and random testing goes against every tenet of such a program.

The Coast Guard requests any comments on including shore-based personnel in an employer sponsored program.

The member companies do not envision including any shore-based personnel in a program. With 95 percent of our vessels being self-unloaders, shore based personnel are not assigned to load/unload our vessels.

Should there be specified circumstances, such as particular rule violations, under which chemical testing would be automatic? If so what kinds . . . ? Could a similar progam work in the marine industry.

The marine industry is very much different than the railroad industry and applications are totally dissimilar. The Association advocates no specificity or automatic conditions similar to rule violations that would trigger testing.

Would the impact of establishing a list of specific rule violations fall disproportionately on Masters or persons directing the movement of the vessel and have little or no application to engineering personnel and others performing tasks that may be equally important to the safety of the vessel but not directly related to its navigation.

We doubt that a set of conditions would trigger disproportionately on the Master vs. for instance the Chief Engineer.

Post Accident Testing

The Association members submit that the threshold for post accident testing is set too low. If, through carelessness, a steward in the galley cuts his finger rendering him incapable of performing his duty involving washing pots and pans for 24 hours it seems ridiculous to categorize this as a "serious marine incident" with the subsequent mandated events. We recommend that the criteria should be amended to when a person is rendered unfit to perform routine or emergency vessel duties for 72 hours.

Our member companies believe there ought to be some element of probable cause even in post-accident testing. Sometimes accidents happen which would clearly not warrant an extensive testing chain of supervisors. If a supervisor gives direction as to what and how he wants a task accomplished and an employee goes about it other than as directed and is injured, it is a waste of time and effort to test the supervisor. Some discretion should be permitted in post accident testing, both of the employee and supervisors.

Further we believe the application of the "person directly involved in a marine casualty or serious marine incident" rule as proposed will have the Master and/or Chief Engineer frequently required to report to the medical facility for testing. The oversight provided aboard vessel by these two as supervisors of virtually everything that transpires dictates that some relief be provided or they will have great potential for being overtested.

Regarding the requirement that as soon as possible after the occurrence of a serious marine incident sampling must be accomplished in all cases where it is feasible within

24 hours, the question arises whether this would require diverting a vessel. In most instances on the Great Lakes, vessels make a landfall every 24 hours, but there are occasions where it's 26 to 30 hours between locations where there is a medical facility. We trust a vessel would not have to divert or turn back solely to meet a 24-hour standard. If so required, this would become extremely expensive in lost vessel time even if a crewmember was put ashore for necessary testing. However, if the Master or Chief Engineer had to be tested as well, then the delay costs become even more unbearable. Operating costs range from $800/hour for our smaller vessels to $1,500/hour for our largest vessels.

Are the costs of required rehabilitation programs warranted by the reduction in societal costs resulting from drug abuse?

Here we believe the Coast Guard is treading well beyond the authority contained in Title 46. We are unaware of any law mandating the Coast Guard issue regulations which have as one of their concerns "societal benefits" or "societal costs." We urge the Coast Guard abstain from making judgments and writing regulations in these regards.

Commenters should address whether this alternative (the fourth option for rehabilitation) would be effective for the marine industry . . . . Would not requiring rehabilitation foster other approaches to combating drug usage?

The majority of our member companies would choose EAP rehabilitation program (Option 4). They believe they should be provided the greatest latitude consistent with their labor management agreement as to whether rehabilitation is offered or not. To layer one layer of requirements after another and take away employer latitude in the handling of its personnel is thought to be regulative overburden not consistent with the free enterprise system.

We invite public comment on what the final rule should contain. For example, should there be a uniform testing period after rehabilitation, or should this be determined on a case-by-case basis? Who should make such a determination: The medical review officer, the EAP counselor, or both together? Should the employee be involved? . . . If we adopt a uniform post-rehabilitation period, how long should it be?

Our member companies do not support a uniform testing period after rehabilitation, but they believe that this matter should be handled on a case-by-case basis. Specific determinations would involve consultations between the company and those overseeing the rehabilitation with the potential for involving the employee as well. Advice from those running the rehabilitation program would be most heavily weighed inasmuch as they are the experts.

We also believe there should not be a uniform rehabilitation period because individual makeups vary, and rehabilitation must be individually tailored, especially as to length.

During and after rehabilitation it is believed that employees are at all times subject to probable cause testing. In rehabilitation there may be occasion for random testing as well although the industry generally opposes random testing on the grounds that it is an unwarranted invasion of privacy and employer/employee trust. However, if an employee is detected as violating this trust through means other than his voluntary disclosure, the Association's members believe subsequent random testing may be warranted. (In dealing with only one employee this is better described as periodic testing on random dates, for it does not truly fit the mold of random testing).

For example should someone undergoing inpatient rehabilitation be subject to post-rehabilitation testing for a longer time than someone who needs only abatement counseling? During the post-rehabilitation period should we prescribe the minimum and/or maximum number of tests to be administered?

We urge the Coast Guard in the strongest terms to recognize that this entire matter deals with human beings with wide differences in their makeup. The earlier thought that individuals should be treated on a case-by-case basis is repeated, and the "one size fits all syndrome" must be consciously avoided. It follows that we reply negatively to the questions above.

What is the minimum employment relationship that an owner or operator should be required to maintain while an employee is undergoing rehabilitation and monitoring? Should an employer be required to pay for rehabilitation and the drug monitoring program?

Response to these questions should be decided on a company-by-company basis as prescribed in their labor management agreement.

What is the appropriate duration of a monitoring program and the number of random chemical tests that should be conducted during the program? What should be considered a bona fide rehabilitation and monitoring program?

Answers to these questions will come from the rehabilitation experts, and it is thought that responses will vary according to the employee. Labor management agreements may also have a bearing on responses.

What are the appropriate roles for the owner or operator and the Coast Guard in overseeing the monitoring program?

We are emphatic in our belief that there should be no Coast Guard role. The matter is one between the company and the overseer of the monitoring program.

Are the costs of required rehabilitation programs warranted by the reduction in the societal costs resulting from drug abuse?

Our member companies don't know what the societal costs are although there is a full awareness that they are considerable. As pointed out earlier we don't believe the Coast Guard should be influenced by societal costs in its rulemaking. Even if they were known, we don't see any charge under existing law that they should influence Coast Guard decisions in the drug and alcohol arenas.

The companies prefer to view the matter with a positive self-interest in mind. The companies have a long term investment in terms of training many of its personnel, at times over many decades. Accordingly, most companies view the rehabilitation option as a way of getting a continuing return on their investment in their greatest asset, their employees.

Comment is requested on how to include these individuals (temporary employees) under the rehabilitation and reemployment programs. The Coast Guard specifically requests comments on the (1) merits of excluding temporary employees from the opportunity for rehabilitation and (2) the definition of temporary employee. The Coast Guard specifically requests comments on the merits of excluding striking employees or employees scheduled for layoff and asks comenters to define "scheduled layoff." Should eligibility for rehabilitation and reemployment be based on length of service, hiring status, or some other criteria.

These matters, including the definition, vary from employer to employer and are covered in the labor management agreement or in corporate personnel policy manuals.

Who should be afforded EAP services and under what circumstances?

This is covered in the labor management agreement or in corporate personnel policy manuals.

What are the estimated costs of individual EAP rehabilitation services under each rehabilitation option?

We don't believe this question has four answers, one for each option. Our experience is that differing problems result in significantly different costs. When peripheral costs are included it will normally cost more to provide equal rehabilitation for a senior Mate or Engineer than for a junior unlicensed employee. See the Drug and Alcohol Rehabilitation Costs on the following page.

Should the Coast Guard specifiy a minimum training period?

The Association believes that training should be accomplished in accordance with the needs of individual companies, and no minimum training period should be prescribed.

For example, should the Coast Guard allow covered employers the option of submitting to the Coast Guard a company-specific anti-drug program that conforms with the basic requirements of the Coast Guard proposed rule?

Yes. As previously stated we oppose the "one size fits all" concept.

Would providing for company-specific programs encourage the development of innovative solutions that may be less costly and more effective? How?

Member companies believe that company-specific programs would be less costly and more effective by virtue of their meeting specific needs of an area or company.

DRUG AND ALCOHOL REHABILITATION COSTS

The following was prepared assuming a four week inpatient Rehabilitation Program (other than Piney Point*) for a licensed First Assistant Engineer with six (6) to ten (10) years of continuous service. The Transportation cost reflects round trip at the current Labor Agreement maximums.

Rehabilitation Program	$11,000.00
Sick Leave Benefits	3,562.00
F.I.C.A.	267.00
Transportation (Employee)	774.00
Transportation (Relief)	774.00
Pre-Admission Physical	40.00
Physical (Relief)	40.00
Drug Screen (Initial & Confirmation)	63.00
TOTAL	$16,520.00

*Piney Point rehabilitation costs are $105/day x 42 days = $4,410

Same as above for an Oiler

Rehabilitation Program	$ 7,835.00
Sick Leave Benefits	744.92
F.I.C.A.	55.94
Transportation (Employee)	774.00
Transportation (Relief)	774.00
Pre-Admission Physical	40.00
Physical (Relief)	40.00
Drug Screen (Initial & Confirmation)	63.00
TOTAL	$10,326.86

How can the Coast Guard ensure that its final rule promote the development of efficient and effective solutions?

If limited to only one piece of advice it would be not to try and rush a rulemaking of this magnitude through to the final rule stage as is currently being done. That promotes neither efficiency or effectiveness. Beyond that, the Coast Guard should listen to what the public is saying in response to the proposal. It is a radical concept that is currently challenged by two cases (National Treasury Employees Union vs. Von Raab; and Burnley vs. Railway Labor Executive Association) currently docketed for review by the U.S. Supreme Court. Before proceeding with an undertaking of this size, it would seem prudent to await Court action.

Whatever sampling rate is chosen as the industry-wide norm, would it be possible for a company-specific program to be designed in a way that would allow employers who can justify a need to test at a lower or higher sampling rate to test at this rate?

Although a majority of our member companies do not support random testing, if such testing is eventually imposed the companies would support giving companies latitude to test at variable justified rates.

In addition are there ways employers may avail themselves of less costly and less intrusive technologies as such advances are made while assuring an appropriate level of safety?

The companies would, without question, choose to avail themselves of new technologies which are currently unknown.

Could the current proposal provide similar flexibility by simply providing a waiver for companies that, for example, ask to use a test they establish which achieves an equivalent level of safety?

Member companies fully support consideration of waiver requests.

What, if any, fundamental requirements should be present in an acceptable company-specific drug abatement program, and what guidelines would the Coast Guard use in reviewing requests for waivers or amendments if such modifications are allowed?

Member companies believe that when their programs can show measures of success, they should be waiver eligible.

Should, for example, the Coast Guard be required to approve any modifications that are designed to achieve a safe and drug-free marine environment?

Yes, certainly.

Should the Coast Guard be required to act on an application for approval of a company-specific program, an amendment, or a waiver request, within a set time period?

Absolutely, and 30 days is suggested. If this entire subject is so important that requests for extension of the comment period currently must be denied, then company requests submitted with the goal of bettering the program should receive prompt consideration and response.

For example, should the Coast Guard prohibit providing access to test results to the general public, including the news media? Does the Coast Guard have the authority to do so?

The Coast Guard should be governed by requirements of the Freedom of Information and Privacy Acts. It is inconceivable that individual Toxicological Reports would be releaseable under provisions of the Privacy Act.

Should the Coast Guard treat the privacy issue for the various testing programs differently?

We would think the Privacy Act would apply uniformly.

In these situations (where an employee previously tested positive and changes employers) how is the second employer to know of the first positive test, especially if the individual does not hold a license, certificate of registry, or merchant mariners document? How is a subsequent employer to know of a series of two positive tests with two different employers?

This industry is not concerned with individuals not holding a merchant mariners document because all of our employees have a document or license.

However, under the proposal, a person with a document or license is of concern.

For example if a licensed employee tests positive, goes through rehabilitation and regains employment with the same company, the company and the Coast Guard know of the positive test. If that employee is laid off, for lack of work, for instance, and later applies to another company, the company would not be aware of previous history.

Under the Privacy Act there can be no release of this data from the first company to the second so the only trigger leading to license or document suspension or revocation will have to be notification to an employer by the Coast Guard when a second event occurs.

Comments on the merits of this disclosure approach (requiring job applicants to disclose in writing all previous positive tests upon application) are requested.

This sounds very much like self-incrimination, but the courts would have to decide that issue. However, if the applicant did not disclose all previous positives, I see no way he would be discovered. Who's to know?

When an employer hires an individual known to have had a prior positive, should the employer then be authorized to fire the worker if he tests positive again, even though it's the first instance of a positive with the current employer?

A majority of our member companies advocate treating the employer like anyone else. Each instance would be judged on its own merits unless the labor management agreement or company policy required otherwise. Ideally, it would be a matter for company discretion.

Over 50 percent of the $66 billion estimate of the cost of drug abuse in society at large is in the form of reduced income of drug users compared with those who do not use drugs. Is it reasonable to assume that a corresponding percentage of benefits would result from increased productivity of the covered marine employers?

The industry has no way to formulate a response to these questions except that we are extremely doubtful that the problem is prevalent on the Great Lakes to anywhere near the degree estimated elsewhere in society. Increased productivity would be marginal if at all discernible.

American Steamship Company

OPERATING POLICIES & PRACTICES

TITLE: EMPLOYEE ASSISTANCE POLICY	NUMBER: 13:05-2
FUNCTION: PERSONNEL	APPLICATION: ALL EMPLOYEES

Policy Statement

The purpose of this Policy Statement is to communicate to the employees of American Steamship company, that alcoholism or chemical dependency is recognized as an illness which is treatable. It is recognized that it is in the best interests of the employee and American Steamship Company that this illness be treated and controlled under this policy statement.

This policy relates to those instances of alcohol or chemical misuse causing deteriorating job performance as well as behavior which may impact negatively upon the company. Our sole objective is to help, not harm. This statement is designed for rehabilitation and not the termination of the employee.

Employees may voluntarily seek help for these problems through American Steamship Company's Employee Assistance Program. This program is available to all employees and their families for assistance with a broad range of problems including: alcohol and chemical abuse and dependency, marital problems, legal problems, financial problems, and work related problems. All information relating to employees using the Employee Assistance Program will be held in the strictest confidence unless specifically released in writing by the employee. If an employee seeks help for an alcohol or chemical dependency problem, it will not affect their current employment status or promotional opportunities. Any employee who participates in the program will be entitled to all the rights and benefits provided to any other employee who is in need of medical care, in addition to specific services and assistance which such a program may provide.

Whenever an American Steamship Company employee is identified as having an alcohol or chemical abuse problem which detracts from or impacts on an employee's ability to perform, the employee will be required to participate in treatment as a condition of continued employment.

DATE/ISSUED: 3/1/86	SUPERSEDES:	AUTHORIZED BY:	PAGE 1 OF 2

American Steamship Company

OPERATING POLICIES & PRACTICES

TITLE: STATEMENT OF POLICY FOR CHEMICAL DEPENDENCY, ABUSE, AND EMPLOYEE ASSISTANCE	NUMBER: 10.11
FUNCTION: PERSONNEL	APPLICATION: ALL EMPLOYEES

Summary Statement

The purpose of this Policy Statement is to communicate to the employees of American Steamship company, that alcoholism or chemical dependency is recognized as an illness which is treatable. It is recognized that it is in the best interests of the employee and American Steamship Company that this illness be treated and controlled under this policy statement.

This policy relates to those instances of alcohol or chemical misuse causing deteriorating job performance as well as behavior which may impact negatively upon the company. Our sole objective is to help, not harm. This statement is designed for rehabilitation and not the termination of the employee.

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DATE/ISSUED: 3/1/86	SUPERSEDES: 1/1/85	AUTHORIZED BY:	PAGE 1 OF 2

Any employee, who participates in the program will be entitled to all the rights or benefits provided to any other employee who is in need of medical care, in addition to specific services and assistance which such a program may provide.

Nothing in this statement is to be interpreted as constituting any waiver of management's responsibility to maintain discipline or the right to invoke disciplinary measurers in the case of misconduct which may result from, or be associated with, the use of abuse of alcohol or mood altering chemicals. Additionally nothing in this policy shall prohibit union members from normal grievance procedures.

Purpose

This policy statement applies to all employees concerning chemical dependency, abuse, and employee assistance.

Procedure

(a) ASC employees and members of this immediate family may voluntarily use the Employee Assistance Program at their discretion by contacting the program administrator. This is a self-referral.

(b) An employee may be referred to the Employee Assistance Program by their supervisor in the event of declining or unsatisfactory job performance, this is a "supervisory referral". The supervisory referral process is as follows:

- Identify declining/unsatisfactory job performance
- * Document unsatisfactory job performance
- Confront employee concerning unsatisfactory job performance and/or behavior using documentation
- Refer employee to EAP. Contact EAP administrator to advise of situation

The use of the EAP shall in no way exempt or relieve an employee from complying with other company policies or procedures.

* Document unsatisfactory performance and/or behavior as it relates to the job.

EXTRACT: 1986-1989 FREIGHTER AGREEMENT BETWEEN SEAFARERS INTERNATIONAL UNION; ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, AFL-CIO; AND GREAT LAKES ASSOCIATION OF MARINE OPERATORS (Revised 1/26/87)

SECTION 42. *Drug Screening:* It is agreed that the Company, at its sole option without prejudicing its right to discipline, in order to provide for the safety and well-being of the employees of the Company, Company property, and the public in general, herewith establishes policy and procedures concerning substance abuse and drug testing while in the employ of the Company.

1. Substance abuse shall be defined to include:

a. The *abuse* of legal drugs, including prescription or over-the-counter drugs, and alcohol.

b. *Use* of any illegal drug or chemical substance including marijuana, cocaine, heroin, amphetamines (speed), etc.

2. Employees may be required to submit to drug testing (urinalysis or breathalyzer) in the event reasonable grounds exist which indicate the employees' involvement with substance abuse. Reasonable ground will include:

a. Irrational, insubordinate, or bizarre behavior which is not in keeping with good order and discipline.

b. Eyewitness reports which indicate that an employee may be using, distributing, possessing, or selling illegal or unauthorized prescription drugs.

c. Documented declining job performance.

d. Involvement in an accident or casualty where use of drugs or alcohol is suspected.

e. Proven evidence that the employee has a previous record of drug abuse.

f. Other reasons which may be mutually agreed upon by the Union and the Company:

3. When an employee is asked to submit a drug screen urinalysis test at the Company's expense, it shall be performed by a laboratory certified to perform such test. As soon as practical, the Union must be notified of the reasons for the test and the results.

4. If the employee refuses to submit to such a test under the circumstances defined above, the employee may be subject to discipline; however, if either the employee or employer wishes to pursue the matter any further, it should be referred to the Great Lakes Seamen's Appeals Board or processed through the grievance machinery, whichever is applicable.

5. If the employee agrees to submit to the test and the results are negative, the matter shall not be pursued any further, and the employee shall be compensated for any wages, benefits, or other contractual rights lost as a result of the testing procedure.

6. If the initial test results are positive, the employee shall have the right to have the sample used for the initial test retested a second time at employer's expense in another certified laboratory using the most accurate methods available.

7. If the results of the second test are positive, the employee shall have the option of *immediately* seeking rehabilitation at the Seafarers Chemical Abuse Center at Piney Point, Maryland or any other facility approved by the GLSAB which may include short-term, out-patient treatment if evaluation indicates that to be appropriate.

8. If the employee chooses not to avail himself or herself of such an opportunity or he or she is unable to successfully complete such a program, either the employer or the employee can pursue the matter to the Great Lakes Seamen's Appeals Board or through the grievance machinery, whichever is applicable.

9. If the employee successfully completes a rehabilitation program as outlined above, the employee shall have absolute right to be reinstated to his or her job without loss of seniority.

10. A Company may exercise the provisions of this clause only after it has a written policy on employee assistance and chemical abuse and makes a copy of that policy available to the Union.

EXTRACT: LABOR CONTRACT BETWEEN COLUMBIA TRANSPORTATION DIVISION, OGLEBAY NORTON COMPANY AND UNITED STEELWORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 5000; MARCH 1, 1987

E. Alcoholism and Drug Abuse

Alcoholism and drug abuse are recognized by the parties to be treatable conditions. Without detracting from the existing rights and obligations of the parties recognized in the other provisions of this Agreement, the Company and the Union agree to cooperate in encouraging employees so afflicted to undergo a coordinated program directed to the objective of their rehabilitation. 80

EXTRACT: SHIPPING RULES -- GREAT LAKES SEAMAN'S JOB SECURITY PROGRAM -- AS ADOPTED JUNE 16, 1987

J. No Seaman shall be shipped while under the influence of drugs or alcohol.

STATE UNIVERSITY OF NEW YORK
MARITIME COLLEGE
Fort Schuyler, Bronx, NY 10465
Telephone (212) 409-7200

24 August 1988

REAR ADMIRAL FLOYD H. MILLER, U. S. N. (RET.)
PRESIDENT

The Executive Secretary
Marine Safety Council
(G-LRA-2/21) (CGD 86-067)
U.S. Coast Guard
Washington DC 20593-0001

Dear Sir:

The professional mariners on staff at the State University of New York Maritime College have reviewed the proposed rulemaking concerning drug testing for American Merchant Marine personnel. It is the opinion of this group that the United States Coast Guard should rethink this proposal and formulate voluntary drug testing programs for the commercial sector to adopt.

The proposed rulemaking offers a variety of suggestions that certainly provides a sound basis for the development of a drug testing program. Unfortunately, it is not practical to regulate the entire maritime industry as one. The operational parameters of a fishing vessel vary greatly from those of a ULCC. Great Lakes vessels have different operating parameters than coast wise container feeders. Crewing arrangements vary from non-union, in-house corporate employees to organized labor arrangements with different representation for each department. Data regarding substance abuse, by the Coast Guard's own admission, is sparse and not conclusive. Once again, variables come into play. It may well be that certain sectors of the industry have significant drug problems, while other sectors have minimal or no drug problems. It should be left to the individual organization to decide for itself if or not a problem exists.

The proposed rulemaking clearly disregards the administration calls for a more competitive posture on the part of American industries. To single out American flag interests for this sort of regulation would have to make one wonder why anyone would consider American registry. When less than 5% of all vessels plying U.S. waters are American flag vessels, we have to question the intent of these proposed regulations. Clearly, some 95 + % of all vessels moving on U.S. waters would not be subject to these regulations. How then are the interests of the American public being served by these proposals? If current regulatory trends continue, there will be no industry left to regulate.

Finally, the cost of this program to an industry that is already flat on its back, is beyond financial reality. Although the Coast Guard openly acknowledges a lack of data to support the suggestion that a drug problem exists, the Coast Guard still feels that a program must be implemented. It is essential that these proposed regulations be reviewed, industry comments taken seriously, and a practical thought out program implemented. We all share concern regarding the serious drug problem that this country faces. We wholehearedly endorse pre-license (original and upgrade) drug testing, pre-employment drug testing, annual physical drug testing, and just cause drug testing. A knee jerk reaction to a problem of this magnitude has never been the winning solution. Please let clear heads prevail.

Sincerely,

F. H. MILLER
Rear Admiral, USN (Ret.)

FHM:esc

(copy forwarded by letter of 25 August 1988 to Edmund B. Welch, Chief Counsel, Committee on Merchant Marine and Fisheries, from RADM F. H. Miller, USN (Ret.)

STATEMENT OF JAMES L. HENRY
PRESIDENT
TRANSPORTATION INSTITUTE
BEFORE THE
SUBCOMMITTEE ON MERCHANT MARINE
COMMITTEE ON MERCHANT MARINE AND FISHERIES
U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 1988

Mr. Chairman, members of the subcommittee:

My name is James L. Henry. I am president of the Transportation Institute, a national trade association representing approximately 140 member companies engaged in foreign and domestic shipping trades and in barge and tugboat operations on the Great Lakes and the network of inland waterways. We appreciate this opportunity to comment on the administration's proposed programs for chemical drug and alcohol testing of commercial vessel personnel.

Unequivocally, the Institute and its member companies are strongly committed to a drug- and alcohol-free maritime environment. However, after a complete review of the proposed regulations within the time permitted, the Institute believes that the proposal as drafted would not realize this goal or lead ~~to~~ enhanced safety, but would instead be deleterious to the maritime community. Contrasted with the enormous cost which would be imposed on the operator, in our view grossly underestimated by the Coast Guard, the benefits in terms of improved prospects for transportation safety are elusive.

If implemented as written, the proposed regulation would not only place a tremendous burden on the industry, in both financial and legal terms, but would also impose on the private sector and the operator the role of a surrogate law enforcement officer responsible for the actions of an employee in and out of the workplace, subjecting the employer to possible civil liability actions. Employer involvement in every aspect of the proposed drug abatement program, including testing, enforcement, and rehabilitation assistance, would place the employer in a costly and untenable legal position.

Furthermore, the proposal is not tailored to the maritime workplace environment. In fact, the uniqueness of the nation's waterborne transportation network is not considered in this proposal. Key provisions of the proposed rulemaking are virtually the same as proposed rules recently issued for mass transit workers, pipeline industry workers and employees of aviation, railroad and motor carrier industries.

As noted, our member companies are uncompromisingly opposed to drug and alcohol abuse in our industry. To the extent that such may exist, they are determined to uncover and eliminate it. The Institute has been informed by a number of our member companies that they -- as a precautionary measure -- have voluntarily initiated, with the cooperation of representative labor organizations, drug and alcohol screening, education and rehabilitation programs, programs which suit the needs of their particular modal environment. The proposed regulations would negate the effectiveness of existing programs by replacing them with yet another layer of unnecessary and unrealistic bureaucratic red tape.

The Institute believes that the proposed regulations are flawed in that they are based on an invalid assumption that because a drug problem exists in society, it must also exist in the maritime industry. In the absence of conclusive empirical data supporting an asserted need for testing of a particular workforce, courts have refused to allow proponents of testing to rely on data based on widespread drug use in all segments of the population. No conclusive evidence has been forthcoming from the Coast Guard indicating that drug abuse actually exists in the maritime sector or -- if assumed to exist -- is sufficiently substantial or threatening to the public safety to justify the approach taken by the Coast Guard. In fact, there appears to be no empirical and substantial data that would couple drug and alcohol abuse with casualties in the maritime sector. Nevertheless, this industry is being heavily penalized in these regulations for casualty incidences which have occurred in other transportation modes and which have no correlation or application to the maritime industry. This is unfair.

Of equal importance, the proposed rulemaking raises a fundamental constitutional question dealing with an individual's protected rights to privacy and freedom from search and seizure and self-incrimination, as well as the intrusion of a government agency into an area traditionally subject to the collective bargaining process. We will not dwell on the privacy issue. Suffice it to say court decisions have held that drug testing without reasonable cause violates the Fourth Amendment. As you know, these numerous cases pending before the Supreme Court may very well be affirmed.

As to the right of management and labor to bargain collectively without government interference, it is our view that drug and alcohol abuse is an important subject area which should be left exclusively to this process. Further, it is our understanding that, under current law, drug testing for current employees and job applicants is indeed a mandatory subject at the collective bargaining table. As noted, this issue has already received labor-management attention in the maritime community, and therefore does not warrant intrusion by the federal government into the internal affairs of labor-management negotiations. Yet it is ironic that an administration that is opposed to government regulation and interference into the private sector and which seeks to encourage individualism and self-initiative would propose regulations of such magnitude and interference without a definitive basis.

A further acute problem with the regulation is the agency's rush to regulate an assumed problem for which no factual evidence exists. The industry was given a 60-day comment period in which to evaluate a proposal of such massive proportions. This limited time frame for receipt of industry comments by the Coast Guard was less than adequate for this pervasive and major a rulemaking, leading us to believe that the proposed regulations are politically motivated in an election year. In fact, with the exception of mass transit and the maritime sector, most major transportation modes were afforded a sufficient time period to analyze the impact of similar proposed regulations on their particular industry. The accelerated schedule which the agency has established for implementing regulations of such economic importance does not permit deliberative and detailed study. In fact, this precipitous action can only lead to inept and costly regulations which will fail a constitutional muster.

The Institute believes that if implemented as drafted, this regulation will merely invite resentment, opposition and litigation which will prove costly for the federal government. At the same time, it will mandate the expenditure of millions of dollars in an industry straining to survive on a program which may be declared unconstitutional by the courts. We have therefore urged the Coast Guard and the Department of Transportation to reevaluate its position on this matter, and should the agency move forward with a drug abatement program, to develop regulations which are practical, effective and within constitutional bounds.

In conclusion, the Institute opines that the proposed regulation is simply too complex to be deliberated in such haste. We ask the subcommittee's assistance in urging the Coast Guard to either withdraw the document at this time or publish it as a supplementary notice of proposed rulemaking with reasonable time for consideration and detailed analysis.

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 4, 5 and 16

[CGD 86-067]

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel

AGENCY: Coast Guard, DOT.

ACTION: Final Rule.

SUMMARY: These regulations require the establishment of anti-drug programs to reduce the incidence of drug abuse by commercial vessel personnel. These programs include pre-employment, periodic, random, post-accident and reasonable cause testing. The post-accident portion of the program also involves testing for alcohol use.

The Coast Guard believes these rules will discourage drug and alcohol use by commercial vessel personnel, reduce the potential for marine casualties related to drug and alcohol use, and enhance the safety of the maritime transportation industry.

EFFECTIVE DATE: This rule is effective on December 21, 1988.

FOR FURTHER INFORMATION CONTACT: Commander John Koski, Project Manager, Marine Investigation Division (G-MMI), Office of Marine Safety, Security and Environmental Protection, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593-0001, (202) 267-2215.

SUPPLEMENTARY INFORMATION: On July 8, 1988, the Coast Guard published a notice of proposed rulemaking, entitled "Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel," in the **Federal Register** (53 FR 25926).

On July 26, 1988, the Coast Guard announced in the **Federal Register** (53 FR 28024) a series of public hearings on the notice of proposed rulemaking. These hearings were held on August 10, 1988 in Houston, Texas; August 12, 1988 in Chicago, Illinois; August 19, 1988 in Washington, DC; and August 22, 1988 in San Francisco, California. A total of 80 individuals made statements on the proposed rules at these hearings. Each hearing was recorded, and copies of the tapes, along with any written statements and other materials provided, have been placed in the public docket. The Coast Guard also received a total of 246 letters commenting on the proposed rules. All of this information has been reviewed and considered in the development of the final rule.

The Office of the Secretary of the Department of Transportation is publishing elsewhere in today's **Federal Register** an Interim Final Rule and request for comments entitled *Procedures for Transportation Workplace Drug Testing Programs.* These Procedures, which will be codified in 49 CFR Part 40, are based on Department of Health and Human Services Guidelines for Drug Testing, with appropriate modifications to allow them to apply to private industry and state and local governments. The new 49 CFR Part 40 provides detailed information for implementation of the drug testing requirements of this rule, setting forth requirements for such things as specimen collection procedures, laboratory procedures, and quality assurance.

Drafting Information

The principal persons involved in drafting this document are CDR John Koski, Project Manager, and Christena Green, Project Counsel, Office of Chief Counsel.

Background

The Coast Guard has explicit statutory authority to deny issuance of a license, certificate of registry, or merchant mariner's document to any individual who (1) has been convicted of violating a dangerous drug law of the United States or a state within 10 years of application, or (2) has ever been a user of, or addicted to, a dangerous drug (46 U.S.C. 7503). Similarly, the Coast Guard has statutory authority to revoke a license, certificate of registry, or merchant mariner's document of any individual who is, or has been, a user of, or addicted to, a dangerous drug (46 U.S.C. 7704(c)). The Coast Guard is further mandated to revoke the license, certificate of registry, or merchant mariner's document of any individual who has been convicted of violating a dangerous drug law of the United States or a state within a 10 year period before the beginning of the proceedings against that individual (46 U.S.C. 7704(b)). It is clear that these statutes intend to exclude drug users and violators of drug statutes from serving on U.S. merchant vessels.

As the Coast Guard stated in its notice of proposed rulemaking, these statutes are currently enforced by examining criminal conviction records of license and document applicants and holders, by the prosecution of those individuals operating a vessel negligently or while intoxicated, and through administrative remedies such as civil penalty actions and suspension and revocation proceedings. These methods are used, however, only after an incident occurs and the Coast Guard obtains evidence on which to base remedial or punitive action.

This final rule is a logical extension of existing regulations to ensure a drug-free working environment in the maritime community. The regulations provide for positive and aggressive action to identify users of dangerous drugs before they are involved in incidents which bring them to the attention of the Coast Guard. The regulations are intended to ensure that users of dangerous drugs are not issued licenses, certificates of registry, or merchant mariner's documents, and are not accepted for employment on vessels engaged in commercial operations. Drug users and abusers will either be deterred from continued drug use or will be faced with sufficient probability of being identified in the workplace and precluded from employment in the industry when such use is detected through chemical testing.

Discussion of Comments

General Overview of Major Issues

The Coast Guard received 246 written comments in response to the notice of proposed rulemaking. Despite the fact that some of these were received after the close of the comment period, all were considered in the formulation of these rules. In addition to the written responses, 80 individuals presented testimony at the four public hearings held by the Coast Guard.

All facets of the maritime industry presented their views, either as individuals, small operators, large corporations, unions, or associations. While there was universal support for a drug-free maritime working environment, there was serious concern about how the Coast Guard proposed to accomplish this goal.

Several sectors felt that the scope of the proposed regulations was too broad and would result in unbearable implementation costs, most notably among small operators. Many felt that only those people operating under the authority of a Coast Guard issued license or merchant mariner's document should be subjected to mandatory drug testing. Echoing this opinion, many others stated that employees serving aboard vessels in capacities which had nothing to do with the safe operation of the vessel should not be subject to the mandatory testing requirements.

Small operators and seasonal operators were seriously concerned that mandatory testing would result in shortages in their workforces, maintaining that potential employees would opt to go into other, equally well-paying jobs which do not require them to be subjected to testing. In addition, a company administered testing program would erode the trust which has typically been established between management and the working members of small operations

Commenters generally supported testing in conjunction with obtaining licenses and post-casualty testing, but felt that such programs should be administered by the Coast Guard and not private industry. There was a split of opinion regarding other types of testing (i.e., pre-employment, random, and reasonable cause); those companies and organizations which currently have effective anti-drug programs generally supported these types of testing, while those without such programs did not feel that all types of testing should be required. Even among those which had existing programs, there was concern that the strict parameters specified in the proposed rules would force them to abandon their programs in order to implement the procedures which are much more costly and more difficult to administer but, in their view, not necessarily more effective. Among individual commenters and labor unions, the opinion was almost universal that mandatory testing would be a violation of constitutional rights, with guilt being assumed until the individual could establish innocence.

Constitutional Issues

Numerous commenters questions the constitutionality of mandatory drug testing of maritime employees. Many commenters requested that the Coast Guard not proceed with this regulatory package until these issues have been resolved by the Supreme Court.

Response: Although the state of the case law is still evolving in rapid fashion and the Supreme Court has not resolved many of the relevant and complex issues, the Coast Guard is confident that testing of employees under this rule will withstand judicial scrutiny on constitutional grounds.

Of particular concern to the commenters is the relevance of the Fourth Amendment to drug testing. The principles of the Fourth Amendment to the U.S. Constitution are paramount in scrutinizing the fundamental legality of many drug testing programs. As a threshold matter, the Fourth Amendment applies to "searches" conducted or mandated by the government and protects individuals against "unreasonable searches and seizures." Action of a private party does not constitute State or Federal action unless there exists a close nexus between the State and the action in question. *See Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Assuming that drug testing programs called for under the final rule do implicate the government, a second issue then arises concerning whether urine tests under these programs are "searches" within the meaning of the Fourth Amendment. Although most courts to address the issue to date have ruled that toxicological testing of employees for the purpose of determining fitness for duty is a search within the meaning of the Fourth Amendment, the issue is not entirely settled. *See Wyman v. James*, 400 U.S. 309, 317–338 (1971) (government welfare caseworker's "home visit" as a precondition for assistance payments is not a Fourth Amendment search). *See also, Lovvorn v. City of Chattanooga*, 1988 U.S. App. Lexis 6952 (6th Cir. May 23, 1988) (Guy, J., dissenting); *National Treasury Employees Union v. von Raab*, 808 F.2d 1057, 1060, 1062 (5th Cir. 1987) (Higginbotham, J., concurring). *Cf Mack v. United States, F.B.I.*, 814 F.2d 120, 125 n.2 (2nd Cir. 1987).

Also assuming, *arguendo*, that urine tests of merchant vessel personnel for prohibited substances are "searches" within the meaning of the Fourth Amendment, it is clear that while searches ordinarily must be conducted pursuant to a warrant issued on probable cause grounds, such a requirement is not always necessary. *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring). Where, for example, "* * * the burden of obtaining a warrant is likely to frustrate the government purpose behind the search * * *" the Supreme Court has routinely held that a warrant is not required by the Fourth Amendment [citing *Camera v. Municipal Court*, 387 U.S. 523, 533 (1967)]. *See e.g., Griffin v. Wisconsin*, 107 S.Ct. 3164, 3167 (1987) (plurality opinion); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The Supreme Court has likewise found that the probable cause standard is inappropriate where it would defeat the purpose that the search is designed to achieve. *See e.g., New Jersey v. T.L.O.*, 469 U.S. 325 at 340–342 (1976) (While "* * * some quantum of individualized suspicion is usually a prerequisite to constitutional search or seizure [,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion" *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–561).

Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *" *New Jersey v. T.L.O.*, 469 U.S. 328 at 340. In determining the reasonableness of a search, the Supreme Court has repeatedly stressed the importance of the facts particular to the search while acknowledging that the test of reasonableness "* * * is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, at 559 (1979). In analyzing a drug testing program, "* * * what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. 325, at 337.

In scrutinizing whether a particular search comports with the Fourth Amendment, courts have adopted a balancing test. In general, to support a claim that a search of an individual or the individual's property is reasonable, the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual's legitimate expectation of privacy. *See e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware vs. Prouse*, 440 U.S. 648, 653 (1979). Thus, the courts must "* * * consider the scope of the particular intrustion, the manner in which it is conducted, the justification for initating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, at 559.

Viewed in this light, it is beyond dispute that the public has an overriding interest in assuring that merchant vessel personnel performing duties which directly affect the safety of a vessel's navigation or operations do so free of prohibited substances. The drug problem in society in general and evidence of drug use in the maritime industry in particular are discussed elsewhere in the preamble of this final rule. The impairing effects of drugs and the substantial risks to public safety posed by merchant vessel personnel who use drugs underlies the compelling governmental interest in promulating this rule.

In contrast, the drug testing requirements of the final rule involve a minimal invasion of privacy. As the Supreme Court has indicated, where searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. *See Delaware v. Prouse*, 440 U.S. 648, at 654–655; *New York v. Burger*, 107 S.Ct. 2636 (1987). The drug testing requirements of the final rule place constraints on an employer's discretion in conducting drug testing. For example, the requirement for random drug tating calls for selection of an employee to be tested in a scientifically acceptable manner, such as use of a computer-based random number generator. Requirements for testing based on reasonable cause or post-accident testing also are severely circumscribed in order to limit an employer's discretion in administering these tests to employees.

The actual testing procedures that each employer is required to implement under this final rule also are narrowly tailored to respect an employee's reasonable expectations of privacy. The procedures governing collection of urine samples, as referenced in the final rule, are carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important employee safeguards, including privacy during collection under most types of tests, stringent laboratory safeguards, and provisions for challenging results.

Equally significant is the fact that urine drug testing of employees performing sensitive safety-related duties is to be conducted in the "context" of the employment relationship. As the Supreme Court has noted, "[t]he operational realities of the workplace * * * may make *some* employees' expectation of privacy unreasonable" *O'Connor v. Orgega*, 107 S.Ct. 1492 (1987). This is particularly important in circumstances where the employee works in an industry in which an employee's activities are subject to extensive regulation. Thus, persons who work in such "closely regulated" industries have a "reduced expectation of privacy" [*New York v. Burger*, 107 S.Ct. 2636 (1987)] and, "in effect consent [ ] to the restrictions placed upon them" [*Almeida-Sanchez v. United States*, 413 U.S. at 271)]. For these reasons, two Federal Courts of Appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has reduced an employee's expectation of privacy. *See Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant operators); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3rd Cir.), *cert. denied*, 479 U.S. 986 (1986) (jockeys); *Policemen's Benevolent Ass'n. Local 318 v. Township of Washington*, 1988 U.S. App. Lexis 8443 (3rd Cir. June 21, 1988) (police officers).

The Coast Guard recognizes that a number of Federal and State courts have rejected government-mandated drug testing program on Fourth Amendment grounds. However, even courts striking drug testing programs have recognized that drug testing is appropriate in other contexts. *See e.g., Lovvorn v. City of Chattanooga*, 1988 U.S.App. Lexis 6952 at 23 (6th Cir. May 23, 1988) (Martin, J.) ("When determining, then whether a mandatory drug search is "reasonable," we believe that, as the costs to society of an impaired employee increase, the requisite level of suspicion that a drug problem exists decreases."); *Policemen's Benevolent Ass'n. Local 318 v. Township of Washington*, 672 F.supp. 779, 792 (D.N.J. 1987), *rev'd*, 1988 U.S.App. Lexis 8443 (3rd Cir. June 21, 1988) ("[T]he need to prevent a major airline disaster presents a far more compelling rationale than those presented [by the municipality in support of testing its police officer.]"); *American Federation of Government Employees v. Meese*, No. C–88–1419–SAW (N.D. Cal. June 16, 1988) (issuing a preliminary injunction against a Bureau of Prison plan to test randomly all agency employees but nonetheless noting that "[t]here are cases in which compulsory drug testing may be justified in the interest of public safety or security." Memorandum opinion at 2).

The Coast Guard also is aware of the recent Ninth Circuit decision that held that the Federal Railroad Administration's mandatory blood and urine testing after certain accidents, incidents, or rule violations is unconstitutional because the rules do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to testing. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988). The Ninth Circuit based its views, in part, on the proposition that " * * * the vast bulk of [railroad] safety regulation is directed at owners and managers of railroads, not employees." *Id.* at 585. However, contrary to the circumstances in the railroad industry, the Coast Guard has a long history of regulating licensed and documented maritime personnel.

The Supreme Court has granted a government petition for a *writ of certiorari* in *Railway Labor Executives' Association v. Burnley*, and has ordered that this case be argued next term "in tandem" with *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988) (upholding drug testing of applicants for critical safety or security sensitive positions in the U.S. Customs Service). Decisions in these cases may not be forthcoming until the spring of 1989. However, in the absence of Supreme Court guidance, the Coast Guard is convinced that the need for drug testing by urinalysis in the maritime industry to determine fitness of maritime personnel for duty in sensitive safety-related positions, and, thereby, to ensure public safety, clearly outweighs the privacy interest of individuals in this class.

While not totally free from doubt, it is the opinion of the Department of Transportation that the Coast Guard's anti-drug progam, and similar drug testing regimens proposed by other administrations within the Department, will be determined to be constitutional. The critical need for properly administered drug testing to ensure that employees in the transportation industry do not have drugs or drug metabolites in their systems while performing sensitive safety- or security-related functions outweighs the reduced privacy interest of these employees.

Lack of Evidence of a Drug Problem in the Maritime Industry

Various segments of the maritime industry have asserted that there has been no demonstrated need to mandate industry-wide drug testing of maritime employees.

Response: The Coast Guard clearly stated in the preamble of the notice of proposed rulemaking that it did not have data which specifically identified the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage. However, many commenters submitted data to indicate that company-sponsored drug testing programs have resulted in significant documented reductions in drug usage among their employees. For example, a major maritime association testified that the lost-time incidence among its member companies has decreased by some 50 percent, and that much of this decline can be attributed to their drug interdiction programs. Other companies have reported similar successes. This information supports the Coast Guard contention that the marine industry is not immune to the drug probem that exists in society in general. It further illustrates that drug testing programs do decrease the incidence of drug usage by maritime personnel.

Accuracy of Drug Test Results

Many commenters base their opposition to drug testing on the perceived inaccuracy of analysis and test results. The commenters raised the issues of false-positive test results, passive inhalation of illicit drugs, misidentification of licit drugs, and ingestion of food substances such as poppy seeds which may result in a positive drug test result.

Response: Each of these issues surfaced with the first series of drug testing programs introduced in the military and the private sector. Since that time, laboratories have been increasingly sophisticated in their analytical methods. Many laboratories have compiled extensive records demonstrating scientific accuracy and protection of individual specimens. Today false-positive test results occur primarily during analysis of a specimen provided during an initial screening test. However, the initial screening test is used only to yield a preliminary indication of the possible presence of drugs. In order to ensure the integrity and accuracy of any test result, the Coast Guard has determined that each positive initial screening test result must be confirmed using Gas Chromotography/Mass Spectrometry (GC/MS). The GC/MS confirmation test is an extremely accurate test and is virtually error-free when properly conducted. This final rule specifies explicit procedures which must be followed to ensure accurate drug test results.

The final rule requires that employers establish and utilize drug testing programs which comply with the requirements of 49 CFR Part 40. These regulations are patterned after the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," published by the Department of Health and Human Services (DHHS) on April 11, 1988. These regulations provide a system of checks and balances during collection and analysis of specimens to ensure the integrity and accuracy of the tests using appropriate scientific methods and rigid chain-of-custody procedures. An employer may only use a laboratory that complies with the regulations and has been certified by the DHHS to process and analyze specimens required by the Coast Guard rule.

Finally, the Coast Guard believes that the Medical Review Officer (MRO) review process that has been provided in 49 CFR Part 40 will preclude misidentification of food substances or licit drugs that might produce a false-positive test result. The procedures provide an individual with an opportunity to report any legal or prescription drugs that he or she may be taking at the time of collection of the specimen. The MRO's broad authority to interpret each confirmed positive test result, to interview and evaluate an employee, and to verify that a confirmed positive test result is accurate should preclude misidentification of licit drugs taken in accordance with a valid prescription or food substances. In summary, the Coast Guard believes that the two-step analysis process, coupled with the requirements for independent review by an MRO, provides a process by which an individual is protected from erroneous false-positive drug test results.

Periodic Testing in Conjunction With License Application or Renewal

While many commenters voiced support for the concept that applicants for original and renewed licenses, certificates of registry, and merchant mariner's documents should be subjected to drug testing, there was almost universal agreement that the costs and responsibility for administering such testing should be borne by the Coast Guard. Further, commenters generally feel that periodic testing has no deterrent value because an employee may temporarily abstain from drug use prior to such a test.

Response: The Coast Guard agrees with the commenters that predetermined periodic testing can be circumvented by a person's abstinence from drug use. However, periodic testing does enable the Coast Guard to identify those persons who are so heavily-dependent on drugs that they are unable to abstain from drug use for even a short period of time prior to a periodic test.

The suggestion that the cost for such testing be borne by the Coast Guard has not been adopted in the final rule. Costs for such testing should appropriately be borne by the person desiring a license, certificate of registry or merchant mariner's document, as are the costs for required physical examinations. There is no reason to impose these costs on the taxpayer, which would be the effect if the Coast Guard were to pay for the testing. Periodic testing will be required in conjunction with required physical examinations after implementation of the rule. However, the periodic testing requirement may be met by satisfactory evidence that an individual has passed a recent drug test or has been participating in a random drug testing program for the previous year.

Pre-employment Testing

Many commenters felt that pre-employment testing was a needless cost to incur since the job applicants would have been tested to obtain their license, certificate of registry or merchant mariner's document and would be immediately subject to the company's random testing program once he or she was hired. They also noted the transient nature of employment in the maritime industry, with mariners frequently signing on a vessel for a single trip, or being employed on a succession of vessels.

Response: The Coast Guard believes that pre-employment testing is a necessary component of an effective anti-drug program. The Coast Guard acknowledges that needless, redundant testing could result if all job applicants were required to undergo pre-employment drug testing. Accordingly, the final rule has been modified to permit employers to hire, without a pre-employment drug test, an individual who can provide satisfactory evidence that he or she has passed a previous pre-employment or periodic drug test within six months of applying for their position or if that individual can establish that, over the previous twelve months he or she has been subject to a random testing program meeting the requirements of these regulations.

Random Testing

Numerous comments were provided concerning the issue of random testing. Some addressed the constitutionality of the tests. Many companies were particularly concerned with the proposed method of selecting employees to be tested. For the widely-scattered and often remotely located maritime workforce, employers felt that random selection of a unit or vessel and unannounced testing of the entire employee complement would provide a satisfactory deterrent effect and would be the most cost-effective method of implementing a random testing program.

Most commenters believe that the proposed 125 percent random sampling rate was excessive and would impose a significant economic burden, particularly on small businesses. The commenters proposed a range of random sampling rates starting at 10 percent annually. The majority of the commenters suggest that a 50 percent random sampling rate for the maritime industry is appropriate. These commenters believe that the 50 percent sampling rate accomplishes a deterrence level consistent with the intent of the proposal.

Response: While noting the constitutional issues surrounding the issue of random testing, the Coast Guard believes that random testing is a fundamental component of an effective drug testing program. Random testing has proven to be an effective deterrent to drug use and will provide safety benefits to the maritime community by reducing or eliminating drug use by maritime personnel. Random testing programs initiated by the military, including the Coast Guard, and private industry show declining drug use, evidenced by a decrease in the number of individuals who test positive for drugs over the course of the drug testing program.

The Coast Guard agrees with the commenters who propose a 50 percent random sampling rate and, therefore, has revised the random sampling provision of the rule consistent with the majority of the comments received in response to the NPRM. The 50 percent sampling rate will provide a sufficient deterrent to drug use without imposing an undue economic or administrative burden on employers and employees subject to the requirements of the regulation. The frequency of testing and the development of a random selection method for testing has been left to the employer. The requirement remains, however, that the method chosen ensures that all employees have a substantially equal chance of being selected for testing and that no employee shall know in advance when such testing will occur. A properly designed unit testing program could meet these requirements.

For some employers, particularly those with a large number of employees subject to drug testing, it may be a substantial burden to move from no drug testing to a 50 percent random testing rate. If required to have tested 50 percent of all covered employees by the end of the first year, employers might have to test at rates far above 50 percent toward the end of the year to make up for lower rates at the beginning. Employers should be permitted to start out at a lower testing rate and work up to 50 percent as experience is gained and the testing procedure becomes administratively routine. We do not want to create a situation which might lead to mistakes by requiring initial testing at too high a rate.

The final rule, therefore, provides an implementation procedure that would allow employers to phase in random drug testing during the first 12 months in which tests are conducted. Employers would not be required to reach an annualized rate of 50 percent until the last test collection. The tests would have to be spaced reasonably through the year to permit the employer to phase into the 50 percent rate, and the total number of tests conducted would have to equal at least 25 percent of the covered population.

Suppose, for example, that an employer has 1000 sensitive safety- and security-related employees. At a 50 percent annual rate, 500 tests would have to be conducted during a year. Under the phase-in, however, the employer could conduct only a few drug tests at the beginning of the program and then gradually increase the number of tests until, by the end of the first year, the annualized rate of 50 percent was achieved. Thus, if the employer's drug testing plan contemplated administering random tests on 12 occasions during the year, the employer would need to administer at least 42 tests (500 divided by 12) on the last occasion, but could administer fewer tests until then. Overall, the employer would have to conduct at least 250 random tests the first year. In subsequent years, the 50 percent rate would be maintained.

Post-Casualty Testing

Numerous commenters felt that post-casualty testing was a law-enforcement function and was appropriately the responsibility of the Coast Guard. Employers generally objected to the proposal that post-casualty testing be conducted by crewmembers when medical personnel were not available.

Response: The Coast Guard appreciates this opinion. However, in many instances the Coast Guard would be unaware that a serious marine incident had occurred until receipt from a vessel master or owner of Form CG-2692, Report of Vessel Casualty. Since time is of the essence in post-casualty testing, the responsibility for ensuring that it is accomplished whenever practicable has been left with the employer.

DHHS Guidelines

Many companies expressed concern over the required use of DHHS Guidelines, especially with respect to random testing programs which they presently have in effect. They stated that such requirements would force them to drastically alter testing programs which have proven effective.

Response: In the notice of proposed rulemaking for this rule, the Coast Guard proposed that all drug testing take place in accordance with the Mandatory Guidelines for Federal Drug Testing Programs of the Department of Health and Human Services (53 FR 11970; April 11, 1938). These guidelines describe the collection and testing procedures applicable to all drug testing in the Federal government, and they include safeguards for accuracy and privacy of testing.

The Department of Transportation has determined that certain modifications of the DHHS Guidelines are appropriate in the context of this and other DOT operating administration drug-free regulations. The result is the DOT "Procedures for Transportation Workplace Drug Testing Programs," which will be codified at 49 CFR Part 40. These DOT Procedures are intended to preserve, to the greatest extent practicable, the important safeguards provided by the HHS Guidelines.

Some of the modifications to the DHHS Guidelines are editorial in nature (for example, references to responsibilities of "agencies" are changed to reference "employers"). Other modifications are intended to take into account differences in the situations of Federal agencies and DOT regulated industries. For example, in testing at remote sites, DOT regulated industries may find it necessary to conduct some kinds of testing in medical facilities, through use of mobile units, or in ordinary toilet facilities, rather than the more permanent collection sites contemplated by the DHHS Guidelines. It may not be practicable for the regulated parties to maintain on-site permanent log books. Consequently, the DOT Procedures permit alternative collection and recordkeeping procedures in these circumstances.

During the comment period on this drug-free workplace rule and those proposed by other operating administrations, comments were received concerning the DHHS Guidelines. These comments will be incorporated in the docket for the Office of the Secretary (OST) interim final rule creating 49 CFR Part 40. The OST will respond to those comments, as well as comments received during the comment period for Part 40, in its notice following the end of that comment period.

Applicability

Many comments were received that stated the scope of applicability of the proposed rule was too broad. They feel many positions in the marine transportation industry are not directly related to vessel navigation or safety, this being especially true in smaller vessel operations such as excursion boats, and on fish processing vessels. Requiring testing of caterers, bartenders, and musicians on small passenger vessels, or people involved in factory-type functions aboard fish processing vessels would prove excessively costly to the operators and such testing would not enhance the safety of navigation or vessel operation.

Response: The Coast Guard agrees with this view. The regulations in the final rule have been changed to eliminate pre-employment, for cause, and random testing requirements for employees whose duties do not directly affect a vessel's safe navigation or operation. In addition to the persons discussed above, the Coast Guard has determined that scientific personnel on oceanographic research vessels can be exempted.

Employee Assistance Programs

Employee assistance programs received wide support with the exception of requiring rehabilitation as part of the program. There was strong opposition from employers to any mandated rehabilitation program. Employers feel it is essential for them to retain the right to terminate a person's employment, if they desire, should that person test positive for drugs. Union comments generally favor some requirement for rehabilitation of testing is mandated.

Response: The Coast Guard agrees that rehabilitation of an employee is not directly related to the safety of the vessel. The Coast Guard's concern is solely that persons who are impaired, or are likely to be impaired, are not carrying out safety-related duties. Employee rehabilitation should be a decision of the employer or agreed upon between labor and management during the collective bargaining process. The requirement for mandatory reinstatement of an employee who successfully completes rehabilitation has been deleted from the final rule. However, a person may not return to a safety-related position after testing positive for drugs without the MRO's recommendation. The person must agree to unannounced testing for a period of 60 months. In addition, the provisions of 46 CFR Part 5 concerning suspension or revocation of a license, certificate of registry, or merchant mariners document, and their restoration, apply.

Comments that the Proposed Rules are Politically-Motivated

Over 80 commenters addressed the "short" comment period allowed for evaluating the proposed regulations. Extentions of the comment period for 30 to 180 days were requested. Many commenters suggested that the proposed rules be reissued as an ANPRM, while others requested that an SNPRM be issued before publication of a final rule. The general perception of many in the industry was that the Coast Guard was rushing to final rule in this instance because of the up-coming elections in November.

Response: Because this issue was raised so frequently by the commenters, the Coast Guard chose to address these comments although they do not address the substance of the rule. The war against drugs is one of this Administration's top priorities. Also, Congress has enacted, and is considering, a substantial amount of legislation addressing the use, distribution, importation, and interdiction of drugs in the United States. Moreover, a significant number of public opinion polls indicate that the American public is deeply concerned about the effect of drug use by individuals in critical safety occupations, including the maritime industry. Development of this rule is motivated by the current political climate only to the extent that these attitudes coincide with the Coast Guard's statutory duties and authority. The Coast Guard is implementing these comprehensive anti-drug regulations because they are consistent with our statutory authority and responsibility to promulgate minimum standards to ensure and promote maritime safety.

Medical Review Officers

Numerous comments were received which indicated opposition to the requirement that employers hire a Medical Review Officer (MRO) to evaluate the results determined to be positive by a testing laboratory. Employers felt that the laboratories would best be able to ascertain the validity of positive test results and the requirement for an MRO represented an unnecessary expense.

Response: After consideration of the comments on the issue of the MROs, the Coast Guard has determined that the requirements to utilize an MRO are appropriate. The Coast Guard believes that the review and evaluation functions of an MRO, as set forth in 49 CFR Part 40, provide critical and necessary safeguards for an employee who is subject to drug testing under the comprehensive anti-drug program. The Coast Guard beleives that the MRO will prove to be a beneficial asset to both employees and employers who are subject to the provisions of the final rule.

Neither this rule nor 49 CFR Part 40 requires that each employer have its own individual MRO. The Coast Guard anticipates that small entities will become associated with large companies, or will participate in a consortium of small companies, in order to comply with the MRO requirements, and that the services of an MRO will not result in unreasonable costs to small entities.

Costs of Implementation

Many commenters stated that the Coast Guard has seriously underestimated the cost of implementing these regulations.

Response: The Coast Guard agrees that the certain cost estimates in the NPRM were lower than can be expected (e.g., initial screen and confirmatory testing costs). These have been increased in the development of the final regulatory impact analysis. However, because of changes included in the final rule (e.g., elimination of rehabilitation requirements and reducing the random testing rate to 50 percent), the estimated overall cost of implementing these regulations has dropped from $82.30 million to a maximum of $9.22 million during the third year of implementation to a constantly recurring annual cost of $7.20 million after the fifth year.

Exemption of Seasonal or Temporary Employees

Numerous requests were received from small passenger vessel operators and others to exclude seasonal or temporary employees. They expressed sincere concerns that requiring prospective employees to undergo pre-employment drug testing and to then be subjected to a random testing program would result in many individuals, notably high school or college students, seeking employment elsewhere. This, in turn, would greatly increase the difficulty of obtaining sufficient help to run a seasonal operation.

Response: As stated previously in this preamble, the Coast Guard has modified the scope of these regulations to exclude persons who are not involved as "crewmembers" aboard a vessel. Small passenger vessel operators will not be required to test employees serving as waiters, waitresses, cooks, bartenders, entertainers, etc., provided their duties do not directly affect the safety of the vessel's navigation or operations. Similarly, many seasonal employees on fish processing vessels are exempted. These changes should alleviate the problems associated with temporary employees. The Coast Guard appreciates the concerns expressed by parties employing high school or college age workers on a seasonal basis. However, many of these persons are solely or primarily responsible for the safe operation of the vessel as for example, a yacht club tender, camp boating instructor, or licensed operator of a sport fishing boat carrying six or fewer passengers. Safety concerns are not lessened because these persons are employed on a seasonal or temporary basis. In fact, there is considerable opinion, and some evidence, that the incidence of drug use is higher among the high school and college age group. The final rule does not exempt seasonal or temporary "crewmembers" from the testing requirements.

Alternate Testing Technologies

Testing of Hair: A number of comments addressed the issue of using testing technologies different from those proposed by the Coast Guard. Three comments suggested that Radio Immunoassay of Hair be permitted as an alternative to urinalysis.

Response: Because the suggestion of drug testing using analysis of hair specimens raises an issue within the expertise of DHHS, the Coast Guard does not intend to include testing of hair at this time. If DHHS finds this drug testing method satisfactory in the future, and if the DOT procedures in 49 CFR Part 40 are revised to include this testing method, or any other proven testing technology, the Coast Guard will adopt them in their rules also.

Breath Testing Devices: Many commenters objected to the requirement in the proposed rules that all inspected vessels certificated for unrestricted ocean routes, and all inspected vessels certificated for restricted overseas routes, have on board at all times an evidential breath testing device (EBT) approved by the National Highway Transportation Safety Administration. They objected primarily to the high initial costs of obtaining this equipment and having to train crewmembers to properly calibrate and operate these devices and to perform post-casualty breath testing on fellow crewmembers.

Response: After reviewing the comments on this issue, the Coast Guard has revised the proposed rule to allow carriage of any breath testing device capable of accurately detecting the presence of alcohol in a crewmember's system. Some of these devices have been shown to be very accurate, easy to use, and inexpensive.

Because of the wide variety of breath testing devices available under the revised rule, the Coast Guard will require only that such devices be used in accordance with procedures specified by the manufacturer. This change will provide employers with sufficient flexibility to choose any accurate breath testing device compatible with their operational circumstances. The use of alcohol is not automatically disqualifying. The weight to be given test results in determining whether the standards of 33 CFR Part 95 have been violated is up to the Administrative Law Judge who can consider the type of device and the conditions under which the test was administered.

The Coast Guard appreciates the concerns raised about testing fellow crewmembers, and allows blood or breath samples to be collected by medical personnel or other qualified nonvessel personnel whenever practicable. However, if a vessel is in a location where such personnel are not available to conduct such tests, breath testing would be required to be done by vessel personnel. Blood testing can only be conducted by qualified medical personnel. The alternative, to forego readily available evidence concerning whether alcohol was involved in a casualty, would not be in compliance with the intent of 46 U.S.C. 6101.

Conflict with Foreign, State or Local Laws, or with Existing Agreements

Numerous comments indicated that drug testing of individuals was contrary to existing foreign or state laws prohibiting such testing. Other comments stated that the current programs are the result of collective bargaining agreements with affected unions and that the requirements of the proposed rules will send them back to the bargaining table.

Response: The Coast Guard recognizes that some state or local laws and some foreign laws may prohibit or limit the testing required under the final rule. Because of the predominant role assigned the Coast Guard concerning the safe operation of U.S. vessels in commercial service, it is the Coast Guard view that these rules preempt state laws. The complexity and variable circumstances encountered in the interaction of U.S. and foreign law concerning U.S. flag vessels operating within the jurisdiction of a foreign country requires each such situation to be separately analyzed.

We are aware of concerns expressed by foreign entities and foreign governments concerning the potential of our rule to have effect outside United States territory. There are several kinds of situations in which this concern appears to arise.

The first such situation involves a foreign citizen employed by a U.S. company. To begin with, we believe it is fundamental that a foreign citizen employed in the United States by an American company is fully subject to U.S. law, including the requirements for drug testing. With respect to employees of an American company located in a foreign country, it is not our intention to require an employer to violate local law. The requirement to ensure that employees located in a foreign country are subject to drug testing will not become effective until January 1, 1990. This additional compliance period is intended to minimize disruption for employers and employees while the U.S. government meets with foreign governments to discuss implementation of the requirements of the rule.

The second situation that has generated interest in this context concerns foreign entities that are contractors to U.S. companies. The Coast Guard position is that a marine employer who uses contract personnel to perform the duties of a crewmember has "engaged" those personnel. Therefore, the final rule subjects employees of the contractor to the same drug-testing requirements as direct employees of the marine employer. This requirement is necessarv to ensure that U.S. companies do not circumvent the rule by contracting out for services. Some foreign entities and their governments, however, have suggested that this gives the rule extraterritorial effect, since a foreign contractor, like a U.S. contractor, would have to comply with our rule.

However, our rule does not *require* any foreign contractor to conduct drug testing of its employees. The rule imposes requirements only on the operator, i.e., marine employer. It is the responsibility of the marine employer to ensure that crewmembers are drug-free, as enforced by the drug-testing program we are today establishing. In that respect, the drug-testing requirements are not fundamentally different from other testing and training requirements. While it is true that foreign contractors will have to ensure that their employees who service U.S. companies meet our requirements, the same is also true for U.S. contractors.

Nevertheless, we appreciate the seriousness of the concerns expressed on this point. Therefore, the final rule provides that U.S. companies can continue to use foreign contractor employees, whether or not they have instituted drug-testing programs, through December 31, 1989. This short delay in the application of our rule to foreign contractors will provide an opportunity for additional discussion between governments.

The third situation involves a foreign citizen, employed by a foreign company, on a U.S. vessel operating in waters subject to the jurisdiction of the United States. Under agreement between the United States and Canada, Canadian pilots are required on American vessels under certain circumstances in both American and Canadian waters. These pilots, moreover, may, at least in some instances, be employees of the Canadian government. Representatives of the Canadian government have expressed the view that requiring testing of these pilots, even if they are in the United States at the time of the test, might violate the Canadian Human Rights Act. While there is as yet no definitive understanding about the extent and effect of Canadian law on random drug testing by Canadians operating in the United States, further consultation with the Canadian government seems advisable. Under the circumstances, we have determined to postpone implementation of the final rule, except for post-casualty testing, insofar as it would affect foreign pilots and foreign vessels, until January 1, 1990. This will allow for consultation between governments about implementation of the requirements of the rule.

There are also issues about random tests for employees of U.S. companies where the vessels may not return to the U.S. during the year. The company is required to conduct the tests in international waters, where feasible, or on board the ship within the territorial waters of a foreign country where such testing does not violate the laws of the foreign country. Where foreign law prohibits the testing of an employee regardless of his location, implementation of the final rule, insofar as it would affect such individuals, is postponed until January 1, 1990, to allow consultations between governments.

We have determined not to make the rule applicable in any situation where compliance would violate the domestic laws or policies of another country. In addition, because of the potential confusion that may exist involving application of this rule in situations where compliance could violate foreign laws or policies, we have determined not to make the rule applicable, until January 1, 1990, in any situation where a foreign government contends that compliance with our rule raises questions of compatibility with its domestic laws or policies. During the next year, the Department of Transportation and other U.S. government officials will be working closely with representatives of foreign governments with the goal of reaching permanent resolution to any conflict between our rule and foreign laws and policies. The U.S. and Canadian Governments have already established a bilateral working group in an attempt to achieve this objective. We believe that considerable progress has already been made, and further meetings will be held in the near future. While we believe that this can be a model for addressing the concerns of other countries, it is not intended to be the exclusive means. The Commandant may delay the effective date further under this section, if such delay is necessary to permit consultation with any foreign governments to be successfully completed.

It is the agency's intention to issue a notice no later than December 1, 1989, that would make any necessary amendments to the rule as a result of discussions with foreign governments. Shortly after their issuance, any such notices will be published in the **Federal Register.** While we recognize that this may create some anomalous conditions in competitive situations, it is the intention of the U.S. government to make every effort to resolve potential conflicts with foreign governments in a manner that accommodates their concerns while ensuring the necessary level of safety by those we regulate.

Section-by-Section Analysis

This final rule reflects substantial changes to those regulations set forth in the notice of proposed rulemaking. These changes have been made as a result of the comments received, issues raised during the public hearings and further review within the Coast Guard.

Amendments to Part 4

The final rule amends the existing marine casualty and investigation regulations by adding chemical testing requirements to be followed when commercial vessels are involved in serious marine incidents. To accomplish this, it has also been necessary to define additional terms utilized in these new regulations.

Section 4.03–2 defines a serious marine incident. Serious marine incidents differ from marine casualties and accidents. Some occurrences considered reportable marine casualties would not be considered serious marine incidents (e.g., suffering vessel damages of $50,000); other occurrences considered serious marine incidents would not be considered reportable marine casualties (e.g., discharging a reportable quantity of a hazardous substance into the navigable waters of the United States).

Section 4.03–4 defines an individual directly involved in a serious marine incident. This rule requires that these individuals be chemically tested for drug or alcohol use. For an individual to be directly involved in a serious marine incident, that individual's order, action or failure to act must have been a significant causative factor in the events leading to or causing a serious marine incident. This would be indicative of human error. Chemical testing would be required to determine whether or not such an error could be a result of drug or alcohol impairment. It is not intended by these regulations that the master of a vessel, who, by virtue of position, is responsible for the entire vessel, be tested after each serious marine incident in which the vessel may be involved. It is also not the intent of these regulations to necessarily test personnel after each material failure which may lead to a serious marine incident (e.g., the helmsman who happens to be on duty at the time of a steering gear failure).

Section 4.03–5 defines a medical facility.

Section 4.03–6 defines qualified medical personnel.

Section 4.03–7 defines a chemical test. Although these final rules recognize only certain chemical tests of urine, blood and breath to determine evidence of dangerous drug or alcohol use, the definition is written in broad enough terms to allow for the acceptance of other types of tests which may be added in subsequent rulemakings.

Paragraph (e) of § 4.05–1 has been revised to require the reporting of a marine casualty to the Coast Guard when an injury results which requires professional medical treatment beyond first aid and, in cases involving crewmembers, renders an individual unfit to perform routine vessel duties. This varies from the previous requirement which required reporting of injuries which incapacitated a person for a period in excess of 72 hours. This eliminates the need to report such cases as sprained ankles whereby an individual could be incapacitiated for over three days and still not require professional medical attention.

A new Subpart 4.06 is added to address mandatory chemical testing following serious marine incidents involving vessels in commercial service. These regulations extend those contained in 33 CFR Part 95, which require determinations as to whether alcohol or drugs are involved in marine casualties and allow for the chemical testing of individuals involved in marine casualties or suspected of being intoxicated. The regulations in this part require chemical testing of individuals directly involved in serious marine incidents.

Section 4.06–1 outlines the responsibilities of the marine employer following the occurrence of a serious marine incident. A marine employer is first required to make a timely, good faith determination as to whether a marine casualty, discharge of oil, or discharge of a hazardous substance is, or is likely to become, a serious marine incident. If the employer determines that the criteria for a serious marine incident has been, or likely will be, met, the marine employer shall then determine who, if anyone, abroad the vessel was directly involved in the incident. The marine employer shall then take all practicable steps to assure that all persons directly involved in the serious marine incident are chemically tested for evidence of dangerous drug or alcohol use. A law enforcement officer may determine that individuals other than those designated by the marine employer should also be designated as being directly involved in the serious marine incident. In such cases, the marine employer must take all practicable steps to test those individuals also.

This section is intended to allow the marine employer to balance the chemical testing requirements of this part against the immediate circumstances surrounding a serious marine incident. The need to control a shipboard fire may far outweigh the necessity to promptly take a breath sample to test for alcohol use. It may be physically impossible to transport a crewmember directly ivnolved in a serious marine incident abroad a fishing vessel in the Gulf of Alaska to a medical facility where a blood sample can be taken and shipped for testing. The Coast Guard expects that timely chemical tests will be conducted on every person directly involved in a serious marine incident. It trusts the marine employer to make good faith determinations as to when such testing is required, who is required to be tested, and when it is practicable to do so.

The regulations also require the marine employer to indoctrinate all individuals engaged or employed aboard a vessel of these requirements. Personnel assigned functions to implement these regulations shall be trained to carry out those duties as necessary.

Section 4.06–5 outlines the responsibilities of persons directly involved in serious marine incidents. An individual can be determined to be directly involved in a serious marine incident by a marine employer or a law enforcement officer. When an individual is directed to undergo chemical testing for evidence of drug or alcohol use by the marine employer or the law enforcement officer, the individual is required to comply. However, no individual can be forcibly compelled to comply with these testing requirements. In cases where an individual refuses to submit to chemical testing required by this part, an entry will be made in the official log book, if one is required to be maintained, and on Form CG–2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident). Such a refusal is considered to be a violation of regulation and will subject individuals holding a license, certificate of registry, or merchant marine's document to suspension and revocation proceedings under 46 CFR Part 5. Individuals, whether or not they hold a license, certificate of registry, or merchant mariner's document, who refuse to submit to testing when directed to do so by their employer or a law enforcement officer will be subject to removal from any duties which directly affect the safety of vessel's navigation or operations. There may be instances where personnel would be unable to submit to such testing in order to perform duties in the aftermath of a serious marine incident which would be necessary for the preservation of life or property or the protection of the environment. In such cases, the testing would have to be delayed or not conducted, as determined necessary by the marine employer.

Section 4.06–10 specifies what types of specimens must be taken to meet the chemical testing requirements of this subpart. Paragraph (a) requires urine specimens to be provided for testing for evidence of dangerous drug use. Urine specimens must be collected and tested in accordance with the requirements of § 4.06–20 and 46 CFR Part 16, "Chemical Testing." Paragraph (b) allows either blood or breath specimens, or both, to be utilized to test for evidence of alcohol use. Because alcohol dissipates quickly from a person's system, it is necessary that the specimens be taken as soon as is practicable following the occurrence of a serious marine incident.

Section 4.06–20 establishes requirements for specimen collection. It is extremely important that specimens be obtained as soon as practicable following the occurrence of a serious marine incident, that they are not altered or tampered with, and that they can be positively tracked from the time the specimens are provided until the time they are tested. To ensure this, designated personnel must supervise the collection process and make certain that the proper procedures are followed. Ideally, specimen collection would be overseen by qualified collection personnel or by a firm offering a specimen collection service, either in a designated shoreside facility or aboard the vessel. Because of the nature of the maritime industry, however, it may be necessary for specimen collections to be carried out in remote locations which would necessitate that trained shipboard personnel collect specimens. This latter option would only be permitted for urine and breath specimen collections: blood specimens are only permitted to be taken by qualified medical personnel.

Paragraph (a) of this section specifies that a vessel certificated for unrestricted ocean routes and a vessel certificated for restricted overseas routes carry on board a breath testing device capable of determining the presence of alcohol in a person's system. The selection of this device is left to the discretion of the marine employer. However, the device must be used in accordance with the procedures specified by its manufacturer. These devices are not required to be carried on other vessels since their routes will, in all likelihood, place them near a medical facility where blood specimens can be taken, near a law enforcement facility where breath testing can be conducted, or in a location where the marine employer or the designated representative can bring testing equipment to the vessel.

Paragraph (b) requires that marine employers have urine specimen collection and shipping kits readily available for use in the collection and shipping of urine specimens following serious marine incidents. These kits need not be maintained aboard vessels if they can be obtained within 24 hours of the occurrence of a serious marine incident. The kits must contain all the items necessary, including written step-by-step procedures to be followed, to ensure that specimens are properly collected and shipped, regardless of the location at which the collection is accomplished. Specimen collection and mailing kit requirements are contained in § 16.330.

Section 4.06–30 requires that body fluid specimens be collected from the remains of crewmembers who die as a result of marine casualties. The marine employer is responsible for notifying the appropriate local authority of this requirement. The marine employer shall make a specimen collection and shipping kit available to the local authority and assist in assuring that the specimen is properly handled and shipped. Recognizing that there may be instances where the local authority or the custodian of the remains may refuse to allow such specimens to be taken, the regulations permit the marine employer to explain why the required specimens were not obtained in such cases.

Section 4.06–40 places the burden of ensuring that blood and urine specimens are properly collected, documented, and shipped upon the marine employer. Paragraph (a) specifies shipping requirements specific to blood specimens, and paragraph (b) specifies requirements for shipment of urine specimens.

Section 4.06–50 requires testing laboratories to provide prompt analyses of specimens sent to them for testing. The testing laboratories are required to send test reports to the Medical Review Officer designated by the marine employer. The main function of the Medical Review Officer is to ensure that any positive test result is not attributable to a prescribed medication or some other acceptable reason.

Paragraph (c) cautions that a positive test result, by itself, shall not constitute a finding that the use of drugs or alcohol was the probable cause of a serious marine incident. Such a fact may, however, be considered as evidence in the investigation of a serious marine incident and may lead to the conclusion that the use of drugs or alcohol was its probable cause.

Section 4.06–60 details the requirements for submittal of chemical testing information to the Coast Guard. This is accomplished through the use of Form CG–2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident). Following the occurrence of a serious marine incident, the marine employer is required to submit this form to the Coast Guard. In cases in which a Form CG–2692 (Report of Marine Accident, Injury or Death) is required to be submitted, the Form CG–2692B shall be appended to it. In cases involving discharges of oil or hazardous substances, where a Form CG–2692 may not be required, the Form CG–2692B shall be submitted to the Coast Guard Officer in Charge, Marine Inspection having jurisdiction over the location where the discharge occurred or nearest the port of the vessel's first arrival following the discharge. The Form CG–2692B requires the marine employer to indicate all individuals directly involved in a serious marine incident. These individuals are to provide specimens for chemical testing as required by this subpart. In instances where individuals refuse to provide required specimens, or where for some reason specimens cannot be obtained, this information shall also be included on the form. The marine employer shall submit a copy of the positive or negative test results for each person designated as a person directly involved in the serious marine incident to the same Officer in Charge, Marine Inspection to whom the Form CG–2692B was submitted.

Amendments to Part 5

Table 5.569 is revised in the final rule to include a listing for "Violation of Regulation: Refusal to provide specimens for required chemical test." The suggested range of appropriate order to be used for this violation will be a 12 to 24 month outright suspension of an individual's license, certificate of registry, or merchant mariner's document.

Amendments to Subchapter B

The final rule amends Subchapter B, Merchant Marine Officers and Seamen, by adding a new Part 16, Chemical Testing. Part 16 is divided into four subparts: Subpart A, General; Subpart B, Required Chemical Testing; Subpart C, Standards for Chemical Testing for Dangerous Drugs; and Subpart D, Employee Assistance Programs.

Subpart A of this part contains requirements of a general nature which apply to the chemical testing of commercial vessel personnel.

Section 16.101 informs the reader of the purpose of the regulations contained in this part, i.e., to provide minimum standards, procedures and means to be used to test for the use of dangerous drugs in order to minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment.

Section 16.101 provides that an employer may test the sample obtained under this rule only for the drugs required or specifically authorized to be tested under the rule. That is, an employer must test the sample for the five major drugs listed in the regulation. Only if, in the context of reasonable cause testing, the Coast Guard authorizes testing for additional Drug X under 49 CFR Part 40 (an approval which would be granted only after consultation with the Department of Health and Human Services, and only on the basis of a DHHS-established testing protocol and positive threshold) may the employer also test the sample for that drug.

Absent such an approval, if the employer wants to test, in addition, for Drug Y, the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of these regulations. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on the Coast Guard regulation as the basis for the request.

Section 16.105 defines several terms utilized in Part 16.

"Chemical test" is defined in broad enough terms to describe virtually any type of chemical test. Although these final rules authorize only certain chemical tests of urine, blood and breath to determine evidence of dangerous drug or alcohol use, the definition is written to allow for the acceptance of other types of tests as they are proven to be satisfactory.

"Commitment of employment" is defined to mean the proof of employment required by 46 CFR 12.25–5.

"Crewmember", as used in this part, is an important term as it defines vessel personnel to whom the regulations of this part apply. The intent of these regulations is to chemically test all individuals engaged or employed aboard a vessel who perform duties which directly affect the safety of the vessel or its operations. This definition states that anyone aboard a vessel who is acting under the authority of a license, certificate of registry, or merchant mariner's document issued under this subchapter, whether or not a member of the vessel's crew, is subject to the requirements of this part. The wording is used to include individuals such as federal pilots who operate aboard a vessel, but are technically not a member of the vessel's crew. While not members of the vessel's crew, they are aboard serving a function, albeit temporary, which can directly affect the safety of the vessel. It is therefore necessary for them to be subject to these chemical testing requirements. The second part of this definition states that anyone engaged or employed to perform duties aboard a United States vessel which is required by law or regulation to be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued under this subchapter which directly affects the safety of the vessel or its operations is similarly subject to the requirements of this part. Thus, state pilots, certain industrial personnel, and undocumented crewmembers would all be subject to the requirements of this part. Certain of these regulations do not apply to individuals employed aboard a small passenger vessel such as waiters, waitresses, bartenders, and musicians who have no duties directly affecting the safety of the vessel. Scientific personnel aboard oceanographic research vessels and individuals primarily employed in the preparation of fish or fish products on fish processing vessels are also excluded from certain testing requirements.

"Dangerous drug" is defined.

"Dangerous drug level" is defined.

"Employer" is defined to include both marine employers and sponsoring organizations, as described below. Many of the regulations in this part refer to employers, vice marine employers. In such cases, marine employers may

utilize sponsoring organizations to fulfill specified regulatory responsibilities.

"Fails a chemical test for dangerous drugs" is defined.

"Intoxicant" is defined to include any form of alcohol, dangerous drug, or combination thereof.

"Marine employer" is broadly defined to mean a vessel's owner, managing operator, charter, agent, master, or person in charge. Many of the regulations in this part pertain specifically to the marine employer. Who specifically executes the regulatory requirement will often depend on the circumstances of a given situation. Where doubt exists as to who will carry out a particular regulatory requirement, written company guidance should be provided.

"Medical Review Officer" is an individual designated by the employer to carry out the duties specified in 46 CFR 16.370. This individual may be employed directly by the employer, or may be provided for as part of a contracted drug testing program.

"Serious marine incident" is defined as in 46 CFR 4.03–2.

"Sponsoring organization" is broadly defined to include companies, consortiums, corporations, associations, unions, or other organizations with which marine employers or their employees are associated. Many of the regulations in this part refer to employers, vice marine employers. In such cases, sponsoring organizations can be used to fulfill the specified regulatory responsibilities.

"Vessel owned in the United States" is defined.

Subpart B of this part delineates the type of required chemical testing.

Section 16.201 emphasizes that chemical testing of personnel must be conducted. Any user who fails a chemical test for dangerous drugs is considered to be a user of dangerous drugs. The employer or prospective employer of an individual who fails to pass a required chemical test must deny that individual employment in, or remove him or her as soon as practicable from duties which directly affect the safety of the vessel's navigation or operations. If an individual holds a license, certificate of registry, or merchant mariner's document and fails to pass a required chemical test, the employer or prospective employer must report the test results to the nearest Officer in Charge, Marine Inspection. The individual will then be subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document under 46 CFR Part 5.

Paragraph (e) of this section permits individuals who have failed a required chemical test to be rehired, provided requirements outlined elsewhere in the regulations have been fulfilled.

Section 16.205 establishes a graduated implementation scale for employers to come into compliance with the requirements of this part. A graduated scale is provided to allow smaller employers time to form associations or other similar sponsoring organizations, if they so choose, to oversee certain testing aspects required by these regulations and enable them to obtain reduced group testing rates at certified testing laboratories.

Marine employers who employ more than 50 employees subject to the requirements of this part are given six months after the effective date of this rule to implement a pre-employment testing program and one year to implement the remainder of the drug testing program.

Marine employers who employ from 11 to 50 employees subject to the requirements of this part are given one year after the effective date of this rule to implement the pre-employment, periodic, post-accident, reasonable cause, and after return to duty testing programs. They must establish random testing programs within two years after the effective date of this rule.

Marine employers who employ 10 or fewer employees subject to the requirements of this part are given two years after the effective date of this rule to implement a complete anti-drug program which fully complies with these regulations.

Paragraph (d) allows random testing programs to be gradually brought into effect over an extended time period of one year. As discussed earlier in this preamble, it may be a substantial burden for employers to move immediately from no drug testing to a 50-percent random testing rate. This paragraph specifies the graduated steps which will be permitted in the implementation of random testing programs.

Paragraph (f) is written to clarify that foreign pilots aboard U.S. vessels operating in waters not subject to the jurisdiction of the United States do not have to meet the testing requirements of this part.

Section 16.207 addresses conflicts with foreign laws. As discussed previously in this preamble, some foreign laws may prohibit testing of their citizens. This section delays implementation of the testing requirements of this part with respect to foreign citizens aboard U.S. vessels in order that agreements can be pursued with foreign governments to clarify this point.

Section 16.210 requires that no one be engaged, employed or otherwise given a commitment of employment as a crewmember aboard a vessel unless that individual passes a chemical test for dangerous drugs. The burden rests upon the marine employer to ensure that this requirement is met. The pre-employment test may be waived if the individual can prove that he or she has passed a pre-employment or periodic chemical test within the previous six months or if the individual can prove that he or she has been subject to an accepted random testing program for not less than twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests. The wording of this section relieves the employer of the burden of pre-employment testing by allowing the hiring of individuals through sponsoring organizations, e.g., unions, which conduct pre-employment and random tests in accordance with these regulations of their members prior to their being assigned a shipboard billet.

Section 16.220 specifies that a chemical test for dangerous drugs must be conducted whenever a physical examination is required by regulations contained elsewhere in this subchapter. If a physical examination is required for a license or merchant mariner's document, the applicant must provide the results of the chemical test to the Coast Guard Regional Examination Center (REC). When the regulations require a license holder to undergo physical examinations on a periodic basis, the results of each required chemical test must be provided to the REC by the individual at the time of license renewal.

If an individual can prove that he or she has passed a pre-employment chemical test within the previous six months or if the individual can prove that he or she has been subject to an accepted random testing program for not less than twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests, a periodic chemical test need not be conducted.

Section 16.230 requires marine employers to provide for the chemical testing of crewmembers on a random basis. As has been discussed previously, marine employers may form or otherwise use sponsoring organizations to conduct their random chemical testing programs.

Employers must test crewmembers on a random basis at an annual rate of not less than 50 percent. Every member of a given population must have a substantially equal chance of selection to be tested on a scientifically valid basis. The basis of selection is left to the employer. Employers may choose to test individuals; employers may choose to test entire units. The important consideration is that the testing frequency and process used in such that an individual employee's chances of selection remain constant throughout his or her employment. Employees may not receive a prewarning of when they are to be randomly tested.

It is important to note that the requirements of this section apply to individuals such as independent tankermen, federal pilots, state pilots, and certain industrial personnel. While not members of the vessel's crew, they are aboard serving a function, albeit temporary, which can directly affect the safety of the vessel or its operations. It is therefore necessary for them to be subject to these chemical testing requirements. Because such individuals commonly work for or through "third parties", e.g., pilot's associations or drilling companies, and are not properly employees of the marine employer, it is incumbent upon the marine employer to ensure that these individuals are either tested under programs established by their employer or association, or are tested under the marine employer's established program.

Paragraph (d) forbids anyone from serving as master, operator, or person in charge on a vessel in a position for which a license or merchant mariner's document is required unless all crewmembers are subject to the random testing requirements of this section. Doing so could result in suspension and revocation proceedings being initiated against the individual. This change was made because it is unreasonable to expect that all holders of licenses or merchant mariner's documents aboard a vessel be cognizant of who is and who is not in compliance with the testing procedures of this section. The master, operator, or person in charge, however, should be.

Section 16.240 requires that all individuals directly involved in a serious marine incident be chemically tested for the presence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06.

Section 16.250 requires an employer to chemically test crewmembers for dangerous drug use when there is reasonable cause to suspect such usage. The decision to test in such circumstances should be based on the observation and concurrence of two persons in supervisory positions, wherever practicable. Whenever such testing is conducted, it shall be logged in the vessel's official log book, if one is required. If an individual refuses to submit or cooperate in the administration of a timely chemical test when directed to do so, this fact shall also be entered in the vessel's official log book. In the case of licensed or documented personnel, this will subject the individual to suspension and revocation proceeding under 46 CFR Part 5.

Section 16.260 requires employers to maintain records of chemical tests performed. These records must be sufficient to provide evidence of the results of chemical tests of crewmembers to satisfy §§ 16.210(b) and 16.220(b). Additionally, the records must be sufficiently detailed so as to permit collection and analysis of the effectiveness of the testing programs. Negative report records must be retained for one year. Positive report records must be maintained for five years. These records must be made available to Coast Guard officials upon request.

Subpart C establishes the standards to be met when chemically testing for dangerous drugs.

Section 16.301 requires that drug testing programs subject to this part be conducted in a manner consistent with 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs. These regulations are based upon "Mandatory Guidelines for Federal Workplace Drug Testing Programs," developed by the Department of Health and Human Services (DHHS Guidelines). These were published in the **Federal Register** on April 11, 1988. This section cautions readers that the regulations in this subpart are summaries of the requirements contained in 49 CFR Part 40. In establishing specific procedures to carry out the requirements of this part, those regulations should be consulted.

Section 16.310 provides the employer with general guidance in the establishment of specimen collection procedures. It stresses principal issues which must be considered during program development (general collection site requirements, security of the collection site, access to the collection site by authorized personnel only, privacy of individuals providing specimens, and maintaining the integrity of specimens after they are given). Specific requirements for these aspects of a testing program are found in 49 CFR Part 40, and these regulations should be consulted to ensure program adequacy.

Section 16.320 requires that a chain of custody be established for each specimen provided for chemical testing. It is extremely important that each specimen can always be accounted for, from the time it is provided through its authorized disposition. A properly established chain of custody ensures that the chances of a specimen being altered, contaminated, switched, or lost are minimized and that test results provided are, in actuality, those of the indicated specimen.

Section 16.330 establishes specimen handling and shipping procedures. The regulations require the employer to obtain a specimen collection and shipping kit to be used to collect specimens and return them to the certified drug testing laboratory. Items required to be provided in the specimen collection and shipping kit are specified. The list is not all-inclusive, and additional items may be included as the employer considers necessary. It is imagined that the employer will work closely with the chosen drug testing laboratory in developing this kit. One important feature of the kit is the set of step-by-step instructions which describe the proper procedures to be followed during specimen collection, handling, and shipping. Because situations are envisioned where specimen collection may be supervised by personnel not overly familiar with these procedures, the specimen collection instructions must be written in a manner which is easily understandable and will result in the specimens being properly provided, stored, handled, and shipped to the testing laboratory.

Section 16.340 requires that laboratories used to conduct the chemical tests required by this part be DHHS certified. The burden is placed upon the employer to ensure that this requirement is met.

Section 16.350 requires that each specimen be analyzed in a manner consistent with 49 CFR 40.24. DHHS certified laboratories will meet this requirement. It also specifies the dangerous drugs for which each specimen must be tested and defines when a specimen is considered to have tested positive. Specimens which indicate the presence of a dangerous drug in excess of the levels established in 49 CFR 40.24 shall be reported to the Medical Review Officer as positive.

Section 16.360 describes the information which must be included on each specimen analysis report. Only specimens tested as positive on the confirmatory test are to be listed as positive on the specimen analysis report. Samples which are negative on the screening test and specimens which are negative on the confirmatory test shall be reported as negative on the specimen analysis report. All specimen analysis reports shall be sent to the Medical Review Officer designated by the employer, rather than to the employer.

Section 16.370 requires employers to designate or appoint a Medical Review Officer (MRO). The primary function of the MRO is to review and interpret each confirmed positive test in order to detemine if there is an alternative medical explanation for a positive test result. The MRO may be employed directly by the employer, or the provision of MRO services may be contracted as part of the drug testing program. The MRO verifies positive test results through interviews with the crewmember who tested positive, reviews of the crewmember's medical history and biomedical factors, and verification of the laboratory report and assessment. The MRO may, if he or she considers it necessary, request the original specimen be reanalyzed to determine the accuracy of the reported test result.

The MRO provides the final report to the employer or the employer's designated agent. The MRO may determine there is a legitimate medical explanation for a confirmed positive test result that is consistent with legal drug use. In such cases the MRO shall report a test result as negative. The MRO may conclude, based on reviews of laboratory inspection reports, quality assurance and quality control data, and other drug test results, that a particular drug test result is insufficient for further action. In such cases the MRO shall also report a test result as negative. If the MRO determines that there is no legitimate medical explanation for a confirmed positive test result that is consistent with legal drug use, the MRO shall report the positive test result to the employer for further proceedings in accordance with the employer's anti-drug program.

The MRO also determines when an individual who has failed a chemical drug test for dangerous drugs may return to work. The decision is made after the MRO determines that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work.

Section 16.380 mandates that employers shall not release individual test results or other personal information from anti-drug program records except: to the Coast Guard where required by these regulations, to specifically identified persons designated by the individual tested, or personally to the individual tested.

Subpart D specifies the requirements of employee assistance programs.

Section 16.401 requires employers to provide an Employee Assistance Program (EAP) for all crewmembers. The employer may establish the EAP as part of its internal personnel service program or the employer may contract with an entity that will provide EAP to a crewmember. The EAP must contain an education program and a training program for all personnel. At least 60 minutes of EAP training must be provided for each supervisor.

E.O. 12291 and DOT Regulatory Policies and Procedures

These regulations are considered to be non-major under Executive Order 12291. However, they are considered to be significant under the DOT regulatory policies and procedures (44 FR 11304; February 26, 1979) because they initiate a substantial regulatory program.

The Coast Guard has prepared and placed in the rulemaking docket a final regulatory evaluation addressing the economic impact of these rules. It may be inspected or copied at the Marine Safety Council, Room 3600, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593-0001, from 8:00 a.m. to 3:00 p.m.

Regulatory Evaluation

The Coast Guard has developed a final regulatory impact analysis and placed it in the docket. As previously stated, the estimated overall cost of implementing these regulations will be a maximum of $9.22 million during the third year of implementation to a constantly recurring annual cost of $7.20 million after the fifth year. Although revisions to the vessel casualty reporting program have recently been effected, existing data does not readily identify drug-related casualties. Therefore, the Coast Guard has not estimated the total cost benefits of this rulemaking. However, the following must be kept in mind.

In 1984 there were approximately 2300 commercial vessel casualties (excluding fishing vessels), resulting in $237 million in damages and 68 deaths. Of these, 1133 of the accidents were directly attributable to personnel-related causes, i.e. carelessness, misjudgment, etc., resulting in $77 million in damages and 29 deaths. (It should be noted that these statistics do not include personnel deaths or injuries which were not associated with vessel accidents.) According to a 1987 NIDA report on Strategic Planning for Workplace Drug Abuse Programs, abusers of drugs and alcohol have 3.6 times as many accidents in comparison to other workers. There is no reason to believe a similar correlation does not exist in the maritime industry. On that basis, it would be reasonable to assume that detecting 7.5 percent drug users in the employee population would have the potential for preventing up to 27 percent (3.6 × 7.5%) of the accidents attributable to personnel-related causes. If 27 percent of the $77 million in damages and 29 deaths attributable to personnel-related causes is prevented some $20.8 million in damages and eight deaths could be prevented. (Additional savings would also be achieved as a result of reduced compensation claims, lower medical costs, and less time lost due to sick leave.)

The Coast Guard believes that if drug screening can prevent even a low percentage of accidents through drug testing and rehabilitation, the program will more than pay for itself. Using the minimum accepted value of a human life of one million dollars, the saving of but a few lives annually, along with reduced property damage, will more than match the cost of the program. This goal is believed achievable, given the success of other drug testing programs.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires review of proposed rules to assess their impact on small business. In consideration of the cost information discussion under the regulatory analysis, the Coast Guard concludes that this final rule could have a significant economic impact on a substantial number of small entites. The Coast Guard has provided viable alternatives for small employers to adopt which would reduce the cost of compliance while achieving the levels of protection sought by these rules. Although unit costs for small entities for certain services required under these regulations may be somewhat higher, small operators have the latitude to utilize cooperative services, or form associations, which will result in a reduction of unit costs. A regulatory flexibility analysis discussing this issue in more detail has been placed in the docket.

Paperwork Reduction Act

This rulemaking contains information collection requirements in the following sections: Part 16, subparts B and C, plus section 46 CFR 4.06. These collection requirements are being submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act (44 U.S.C. 3501 et. seq.). Under § 4.06–60, the employer is required to submit a Form CG–2692B

(Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident) to the Coast Guard whenever personnel are directed to provide specimens for mandatory chemical testing after the occurrence of a serious marine incident. Employers are also required to maintain records of the results of chemical testing for dangerous drugs under § 16.260.

Federalism Implications

This regulation has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The rules affect the safety of vessels in interstate and foreign commerce and are directly related to the qualifications of personnel licensed by the U.S. Coast Guard and their working conditions on vessels. These are express statutory responsibilities of the U.S. Coast Guard and there are no similar State respcnsibilities or programs in these areas.

Environmental Assessment

The Coast Guard has considered the environmental impact of these regulations and concluded that, under section 2.B.2.1. of Commandant Instruction M16475.1B, they will have no significant environmental impact and are categorically excluded from further environmental documentation.

List of Subjects

46 CFR Part 4

Administrative practice and procedures, Investigations, Accidents, Marine safety, National Transportation Safety Board (added 11/30/88) Reporting and recordkeeping requirements, Alcohol and alcoholic beverages, Drugs.

46 CFR Part 5

Administrative practice and procedures, Investigations, Administrative law judge, Investigating officer, Seamen, License, Certificate, Document, Administrative hearings, Navigation (Water), Suspension and revocation, Marine safety, Alcohol and alcoholic beverages, Drugs.

46 CFR Part 16

Seamen, Marine safety, Navigation (Water), Alcohol and alcoholic beverages, Drugs.

Final Rule

For the reasons set out in the preamble, Title 46, Chapter I, of the Code of Federal Regulations, is amended as follows:

PART 4—[AMENDED]

1. The table of contents of Part 4 is amended by adding the following:

* * * * *

Subpart 4.06—Mandatory Chemical Testing Following Serious Marine Incidents Involving Vessels in Commercial Service

4.06–1 Responsibilities of the marine employer.
4.06–5 Responsibilities of individuals directly involved in serious marine incidents.
4.06–10 Required specimens.
4.06–20 Specimen collection requirements.
4.06–30 Specimen collection in incidents involving fatalities.
4.06–40 Specimen handling and shipping.
4.06–50 Specimen analysis and follow-up procedures.
4.06–60 Submission of reports and test results.

* * * * *

2. The authority citation for Part 4 is revised to read as follows:

Authority: 33 U.S.C. 1231, 43 U.S.C. 1333; 46 U.S.C. 2103, 2306, 6101, 6301, 6305, 50 U.S.C. 198; 49 CFR 1.46, except Subpart 4.40 for which the authority is: 49 U.S.C. 1903(a)(1)(E); 49 CFR 1.46.

3. Subpart 4.03 is amended by adding new §§ 4.03–2, 4.03–4, 4.03–5, 4.03–6, and 4.03–7 to read as follows:

Subpart 4.03—Definitions

* * * * *

§ 4.03–2 Serious marine incident.

The term "serious marine incident" includes the following events involving a vessel in commercial service:

(a) Any marine casualty or accident as defined in § 4.03–1 which is required by § 4.05–1 to be reported to the Coast Guard and which results in any of the following:

(1) One or more deaths;

(2) An injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and, in the case of a person employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties;

(3) Damage to property, as defined in § 4.05–1(f) of this part, in excess of $100,000;

(4) Actual or constructive total loss of any vessel subject to inspection under 46 U.S.C. 3301; or

(5) Actual or constructive total loss of any self-propelled vessel, not subject to inspection under 46 U.S.C. 3301, of 100 gross tons or more.

(b) A discharge of oil of 10,000 gallons or more into the navigable waters of the United States, as defined in 33 U.S.C. 1321, whether or not resulting from a marine casualty.

(c) A discharge of a reportable quantity of a hazardous substance into the navigable waters of the United States, or a release of a reportable quantity of a hazardous substance into the environment of the United States, whether or not resulting from a marine casualty.

§ 4.03–4 Individual directly involved in a serious marine incident.

The term "individual directly involved in a serious marine incident" is an individual whose order, action or failure to act is determined to be, or cannot be ruled out as, a causative factor in the events leading to or causing a serious marine incident.

§ 4.03–5 Medical facility.

The term "medical facility" means an American hospital, clinic, physician's office, or laboratory, where blood and urine specimens can be collected according to recognized professional standards.

§ 4.03–6 Qualified medical personnel.

The term "qualified medical personnel" means a physician, physician's assistant, nurse, emergency medical technician, or other person authorized under State or Federal law or regulation to collect blood and urine specimens.

§ 4.03–7 Chemical test.

The term "chemical test" means a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of dangerous drug or alcohol use.

4. Section 4.05–1(e) is revised to read as follows:

§ 4.05–1 Notice of marine casualty.

* * * * *

(e) Injury which requires professional medical treatment beyond first aid and, in the case of a person engaged or employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties.

* * * * *

5. A new Subpart 4.06 is added to read as follows:

Subpart 4.06—Mandatory Chemical Testing Following Serious Marine Incidents Involving Vessels in Commercial Service

§ 4.06-1 Responsibilities of the marine employer.

(a) At the time of occurrence of a marine casualty, a discharge of oil into the navigable waters of the United States, a discharge of a hazardous substance into the navigable waters of the United States, or a release of a hazardous substance into the environment of the United States, the marine employer shall make a timely, good faith determination as to whether the occurrence currently is, or is likely to become, a serious marine incident.

(b) When a marine employer determines that a casualty or incident is, or is likely to become, a serious marine incident, the marine employer shall take all practicable steps to have each individual engaged or employed on board the vessel who is directly involved in the incident chemically tested for evidence of drug and alcohol use.

(c) The determination of which individuals are directly involved in a serious marine incident is to be made by the marine employer. A law enforcement officer may determine that additional individuals are directly involved in the serious marine incident. In such cases, the marine employer shall take all practicable steps to have these individuals tested in accordance with paragraph (b) of this section.

(d) The requirements of this subpart shall not prevent vessel personnel who are required to be tested from performing duties in the aftermath of a serious marine incident when their performance is necessary for the preservation of life or property or the protection of the environment.

(e) The marine employer shall ensure that all individuals engaged or employed on board a vessel are fully indoctrinated in the requirements of this subpart, and that appropriate vessel personnel are trained as necessary in the practical applications of these requirements.

(f) Each marine employer shall implement the testing requirements of this subpart in accordance with the implementation schedule provided in 46 CFR 16.205 and 16.207.

§ 4.06-5 Responsibilities of individuals directly involved in serious marine incidents.

(a) Any individual engaged or employed on board a vessel who is determined to be directly involved in a serious marine incident shall provide blood, breath or urine specimens for chemical tests required by § 4.06-10 when directed to do so by the marine employer or a law enforcement officer.

(b) If the individual refuses to provide blood, breath or urine specimens, this refusal shall be noted on Form CG-2692B and in the vessel's official log book, if one is required.

(c) No individual may be forcibly compelled to provide specimens for chemical tests required by this part; however, refusal is considered a violation of regulation and could subject the individual to suspension and revocation proceedings under Part 5 of this chapter and removal from any duties which directly affect the safety of the vessel's navigation or operations.

§ 4.06-10 Required specimens.

Each individual required to submit to chemical testing shall, as soon as practicable, provide the following specimens for chemical testing:

(a) Urine specimens, collected in accordance with § 4.06-20 and Part 16 of this Chapter.

(b) Blood or breath specimens, or both, collected in accordance with § 4.06-20.

§ 4.06-20 Specimen collection requirements.

(a) All inspected vessels certificated for unrestricted ocean routes, and all inspected vessels certificated for restricted overseas routes, are required to have on board at all times a breath testing device capable of determining the presence of alcohol in a person's system. The breath testing device shall be used in accordance with procedures specified by the manufacturer.

(b) The marine employer shall ensure that urine specimen collection and shipping kits meeting the requirements of § 16.330 of this part are readily available for use following serious marine incidents. The specimen collection and shipping kits need not be maintained aboard each vessel if they can otherwise be readily obtained within 24 hours from the time of the occurrence of the serious marine incident.

(c) The marine employer shall ensure that specimens required by § 4.06-10 are collected as soon as practicable following the occurrence of a serious marine incident.

(d) When obtaining blood, breath, and urine specimens, the marine employer shall ensure that the collection process is supervised by either qualified collection personnel, the marine employer, a law enforcement officer, or the marine employer's representative.

(e) Chemical tests of an individual's breath for the presence of alcohol using a breath testing device may be conducted by any individual trained to conduct such tests. Blood specimens shall be taken only by qualified medical personnel.

§ 4.06-30 Specimen collection in incidents involving fatalities.

(a) When an individual engaged or employed on board a vessel dies as a result of a serious marine incident, blood and urine specimens must be obtained from the remains of the individual for chemical testing, if practicable to do so. The marine employer shall notify the appropriate local authority, such as the coroner or medical examiner, as soon as possible, of the fatality and of the requirements of this subpart. The marine employer shall provide the specimen collection and shipping kit and request that the local authority assist in obtaining the necessary specimens. When the custodian of the remains is a person other than the local authority, the marine employer shall request the custodian to cooperate in obtaining the specimens required under this part.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary specimens, the marine employer shall provide an explanation of the circumstances on Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

§ 4.06-40 Specimen handling and shipping.

(a) The marine employer shall ensure that blood specimens collected in accordance with §§ 4.06-20 and 4.06-30 are promptly shipped to a testing laboratory qualified to conduct tests on such specimens. A proper chain of custody must be maintained for each specimen from the time of collection through the authorized disposition of the specimen. Blood specimens must be shipped to the laboratory in a cooled condition by any means adequate to ensure delivery within twenty-four (24) hours of receipt by the carrier.

(b) The marine employer shall ensure that the urine specimen collection procedures of § 16.310 of this part and the chain of custody requirements of § 16.320 are complied with. The marine employer shall ensure that urine specimens required by §§ 4.06-20 and 4.06-03 are promptly shipped to a laboratory complying with the requirements of 49 CFR Part 40. Urine specimens must be shipped by an expeditious means, but need not be shipped in a cooled condition for overnight delivery.

§ 4.06–50 Specimen analysis and follow-up procedures.

(a) Each laboratory will provide prompt analysis of specimens collected under this subpart, consistent with the need to develop all relevant information and to produce a complete analysis report.

(b) Reports shall be sent to the Medical Review Officer meeting the requirements of 40 CFR 40.27, as designated by the marine employer submitting the specimen for testing. Whenever a urinalysis report indicates the presence of a dangerous drug or drug metabolite, the Medical Review Officer shall review the report as required by 49 CFR 40.27 and submit his or her findings to the marine employer. Blood test reports indicating the presence of alcohol shall be similarly reviewed to determine if there is a legitimate medical explanation.

(c) Analysis results which indicate the presence of alcohol, dangerous drugs, or drug metabolites shall not be construed by themselves as constituting a finding that use of drugs or alcohol was the probable cause of a serious marine incident.

§ 4.06–60 Submission of reports and test results.

(a) Whenever an individual engaged or employed on a vessel is identified as being directly involved in a serious marine incident, the marine employer shall complete Form CG–2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serous Marine Incident).

(b) When the serious marine incident requires the submission of Form CG–2692 (Report of Marine Casualty, Injury or Death) to the Coast Guard in accordance with § 4.05–10, the report required by paragraph (a) of this section shall be appended to Form CG–2692.

(c) In incidents involving discharges of oil or hazardous substances as described in § 4.03–2 (b) and (c) of this part, when Form CG–2692 is not required to be submitted, the report required by paragraph (a) of this section shall be submitted to the Coast Guard Officer in Charge, Marine Inspection, having jurisdiction over the location where the discharge occurred or nearest the port of first arrival following the discharge.

(d) Upon receipt of the report of chemical test results, the marine employer shall submit a copy of the test results for each person listed on the CG–2692B to the Coast Guard Officer in Charge, Marine Inspection to whom the CG–2692B was submitted.

PART 5—[AMENDED]

6. The authority citation for Part 5 continues to read as follows:

Authority: 46 U.S.C. 7101, 7301, and 7701; 50 U.S.C. 198; 49 CFR 1.46(b).

§ 5.569 [Amended]

7. In § 5.569 add to Table 5.569 the following new offense after Incompetence:

Type of offense	Range of order (in months)
* * *	* *
Violation of Regulation:	
Refusal to provide specimens for required chemical test.	12–24
* * *	* *

8. A new Part 16 is added to Subchapter B to read as follows:

PART 16—CHEMICAL TESTING

Subpart A—General

Sec.
16.101 Purpose of regulations.
16.105 Definitions of terms used in this part.

Subpart B—Required Chemical Testing

16.201 Application.
16.205 Implementation of chemical testing programs.
16.207 Conflict with foreign laws.
16.210 Pre-employment testing requirements.
16.220 Periodic testing requirements.
16.230 Random testing requirements.
16.240 Serious marine incident testing requirements.
16.250 Reasonable cause testing requirements.
16.260 Records.

Subpart C—Standards for Chemical Testing for Dangerous Drugs.

16.301 Procedures for Transportation Workplace Drug Testing Programs.
16.310 General.
16.320 Chain of custody.
16.330 Specimen handling and shipping.
16.340 Test laboratory requirements.
16.350 Specimen analyses.
16.360 Specimen analysis reports.
16.370 Medical Review Officer.
16.380 Release of information.

Subpart D—Employee Assistance Programs.

16.401 Employee Assistance Program (EAP).

Authority: 46 U.S.C. 2103, 3306, 7101, 7301, and 7701; 49 CFR 1.46.

Subpart A—General

§ 16.101 Purpose of regulations.

(a) The regulations in this part provide a means to minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment.

(b) These regulations prescribe the minimum standards, procedures, and means to be used to test for the use of dangerous drugs.

(c) As part of a reasonable cause drug testing program established pursuant to this part, employers may test for drugs in addition to those specified in this part only with approval granted by the Coast Guard under 49 CFR Part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§ 16.105 Definitions of terms used in this part.

"Chemical test" means a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of dangerous drug or alcohol use.

"Commitment of employment" means the proof of employment required by 46 CFR 12.25–5.

"Crewmember" means an individual who is:

(a) On board a vessel acting under the authority of a license, certificate of registry, or merchant mariner's document issued under this subchapter, whether or not the individual is a member of the vessel's crew; or

(b) Engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ, or be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued under this subchapter, except the following:

(1) Individuals primarily employed in the preparation of fish or fish products or in a support position not related to navigation on a fish processing vessel;

(2) Scientific personnel on an oceanographic research vessel; and

(3) Individuals not required under Part 15 of this subchapter who have no duties which directly affect the safety of the vessel's navigation or operations.

"Dangerous drug" means a narcotic drug, controlled substance, and marijuana (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802)).

"Dangerous drug level" means the amount of traces of dangerous drugs or drug metabolites in an individual's breath, blood, urine, saliva, or body fluids or tissues.

"Drug test" means a chemical test of an individual's urine for evidence of dangerous drug use.

"Employer" means a marine employer or sponsoring organization.

"Fails a chemical test for dangerous drugs" means the test result is reported as positive for the presence of dangerous drugs or drug metabolites in an individual's system after a Medical Review Officer's review in accordance with 49 CFR 40.27.

"Intoxicant" means any form of alcohol, dangerous drug, or combination thereof.

"Marine employer" means the owner, managing operator, charterer, agent, master, or person in charge of a vessel, other than a recreational vessel.

a (added 11/30/88)

"Medical Review Officer" means an individual designated by the employer to carry out the duties specified in § 16.370 of this part.

"Serious marine incident" means an event defined in 46 CFR 4.03–2.

"Sponsoring organization" is any company, consortium, corporation, association, union, or other organization with which individuals serving in the marine industry, or their employers, are associated.

"Vessel owned in the United States" means any vessel documented or numbered under the laws of the United States; and any vessel owned by a citizen of the United States that is not documented or numbered by any nation.

Subpart B—Required Chemical Testing

§ 16.201 Application.

(a) Chemical testing of personnel must be conducted as required by this subpart.

(b) If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs.

(c) If an individual holding a license, certificate of registry, or merchant mariner's document fails a chemical test for dangerous drugs, the individual's employer or prospective employer shall report the test results in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI). The individual shall be denied employment as a crewmember or removed from duties which directly affect the safety of the vessel's navigation or operations as soon as practicable and shall be subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document under 46 CFR Part 5.

(d) If an individual who does not hold a license, certificate of registry, or merchant mariner's document fails a chemical test for dangerous drugs, the individual shall be denied employment as a crewmember or removed from duties which directly affect the safety of the vessel's navigation or operations as soon as practicable.

(e) An individual who has failed a required chemical test for dangerous drugs may not be reemployed aboard a vessel until the requirements of § 16.370(d) of this part and 46 CFR Part 5, if applicable, have been satisfied.

§ 16.205 Implementation of chemical testing programs.

(a) Each employer who employs more than 50 employees required to be tested under this part shall implement the pre-employment testing program required in § 16.210 not later than June 21, 1989. All other employer testing programs required by this part shall be implemented not later than December 21, 1989.

(b) Each employer who employs from 11 to 50 employees required to be tested under this part shall implement the pre-employment, serious marine incident, and reasonable cause testing programs required by this part not later than December 21, 1989. The random testing programs required by § 16.230 of this part shall be implemented not later than December 21, 1990.

(c) Each employer who employs 10 or fewer employees required to be tested under this part shall implement the employer testing programs required by this part not later than December 21, 1990.

(d) During the first 12 months following the institution of random drug testing pursuant to this section, an employer shall meet the following conditions:

(1) The random drug testing is spread reasonably through the 12-month period;

(2) The last test collection during the year is conducted at an annualized rate of 50 percent; and

(3) The total number of tests conducted during the 12 months is equal to at least 25 percent of the covered population.

(e) The periodic testing requirements of § 16.220 apply to physical examinations performed after December 21, 1990.

(f) When a vessel owned in the United States is operating in waters that are not subject to the jurisdiction of the United States, the testing requirements of §§ 16.210 and 16.230 do not apply to a citizen of a foreign country engaged or employed as pilot in accordance with the laws or customs of that foreign country.

(g) Upon written request of an employer, Commandant (G–MMI) will review the employer's chemical testing program to determine compliance with the provisions of this part.

§ 16.207 Conflict with foreign laws.

(a) This part shall not apply to any person for whom compliance with this part would violate the domestic laws or policies of another country.

(b) This part is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of this part raises questions of compatibility with that country's domestic laws or policies. On or before December 1, 1989, the Commandant shall issue any necessary amendment resolving the applicability of this part to such person on and after January 1, 1990.

§ 16.210 Pre-employment testing requirements.

(a) No marine employer shall engage, employ, or otherwise give a commitment of employment to, any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs for that employer.

(b) The individual is not required to undergo the pre-employment test required by paragraph (a) of this section if the individual provides satisfactory evidence that he or she has:

(1) Passed a pre-employment test for the marine employer or another employer, or a periodic chemical test for dangerous drugs, within the previous six months; or

(2) Been subject to a random testing program meeting the criteria of § 16.230 of this part during the previous twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests.

§ 16.220 Periodic testing requirements.

(a) Whenever a physical examination is required for an individual by this subchapter, a chemical test for dangerous drugs must be included as a part of the physical examination. If a physical examination is required for a license or merchant mariner's document application, the applicant shall provide the results of the chemical test administered as part of the physical examination to the Coast Guard Regional Examination Center (REC). For those individuals required by this subchapter to receive physical examinations on a periodic basis, the individual shall provide the result of each required chemical test to the REC at the time the individual applies for a renewal of his or her license. Only the results of those chemical tests taken since the individual's most recent license renewal need be submitted.

(b) The individual is not required to undergo the periodic chemical test required by paragraph (a) of this section

If the individual provides satisfactory evidence that he or she has:

(1) Passed a pre-employment or a periodic chemical test for dangerous drugs within the previous six months; or

(2) Been subject to a random testing program meeting the criteria of § 16.230 of this part during the previous twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests.

§ 16.230 Random testing requirements.

(a) Marine employers shall provide for the selection of crewmembers for chemical testing for dangerous drugs on a random basis. Random selection of individual crewmembers means that every member of a given population has a substantially equal chance of selection on a scientifically valid basis. The testing frequency and selection process shall be such that an employee's chance of selection continues to exist throughout his or her employment. Random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers aboard, provided each vessel subject to the marine employer's test program remains equally subject to selection.

(b) Marine employers may form or otherwise use sponsoring organizations, or may use contractors, to conduct the random chemical testing programs required by this part.

(c) Each marine employer shall ensure that crewmembers are tested on a random basis at an annual rate of not less than 50 percent.

(d) An individual may not be engaged or employed, including self employment, on a vessel in a position as master, operator, or person in charge for which a license or merchant mariner's document is required by law or regulation unless all crewmembers are subject to the random testing requirements of this section.

§ 16.240 Serious marine incident testing requirements.

The marine employer shall ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06.

§ 16.250 Reasonable cause testing requirements.

(a) The marine employer shall require any crewmember engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ or be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued under this subchapter, who is reasonably suspected of using a dangerous drug to be chemically tested for dangerous drugs.

(b) The marine employer's decision to test must be based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use. Where practicable, this belief should be based on the observation of the individual by two persons in supervisory positions.

(c) When the marine employer requires testing of an individual under the provisions of this section, the individual must be informed of that fact and directed to provide a urine specimen as soon as practicable. This fact shall be entered in the vessel's official log book, if one is required.

(d) If an individual refuses to provide a urine specimen when directed to do so by the employer under the provisions of this section, this fact shall be entered in the vessel's official log book, if one is required.

§ 16.260 Records.

(a) Employers shall maintain records of chemical tests which the Medical Review Officer reports as "positive" for a period of a least 5 years and shall make these records available to Coast Guard officials upon request. Records of tests reported as "negative" shall be retained for one year.

(b) The records shall be sufficient to:

(1) Satisfy the requirements of §§ 16.210(b) and 16.220(b) of this part.

(2) Identify the total number of individuals chemically tested annually for dangerous drugs in each of the categories of testing required by this part including the annual number of individuals failing chemical tests and the number and types of drugs for which individuals tested positive.

Subpart C—Standards for Chemical Testing for Dangerous Drugs

§ 16.301 Procedures for Transportation Workplace Drug Testing Programs.

Drug testing programs subject to this part shall be conducted in accordance with 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs. This subpart summarizes requirements for drug testing programs contained in those regulations. Those regulations should be consulted to determine the specific procedures which must be established and utilized. Drug testing programs required by this part shall use only drug testing laboratories certified by the Department of Health and Human Services (DHHS).

§ 16.310 General.

(a) *Collection site.* The employer shall ensure that the collection site is adequate to provide for the collection, security, temporary storage, and shipping of specimens to a certified drug testing laboratory.

(b) *Security.* Procedures shall provide for the collection site to be secure. Collection sites dedicated solely for specimen collection must be secure at all times. Collection sites which are not dedicated solely for specimen collection must be secured during specimen collection.

(c) *Access to authorized personnel only.* No unauthorized personnel shall be permitted in any part of a collection site when specimens are collected nor shall unauthorized personnel be allowed access to stored specimens.

(d) *Privacy.* Procedures for collecting urine specimens shall allow for individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.

(e) *Integrity of specimens.* Collection site personnel shall take precautions to ensure that each specimen is not adulterated or diluted during the collection process.

§ 16.320 Chain of custody.

(a) A chain of custody for each specimen to be chemically tested shall be established and maintained from the time of specimen collection through the testing of the specimen.

(b) If a specimen is not immediately prepared for shipment, it shall be safeguarded during temporary storage.

(c) Every effort shall be made to minimize the number of persons handling specimens.

§ 16.330 Specimen handling and shipping.

(a) The employer shall obtain a specimen collection and shipping kit to be used to collect specimens and ship them to the certified drug testing laboratory.

(b) The specimen collection and shipping kit, as required by 49 CFR Part 40, shall contain:

(1) Plastic urine specimen bottles in a sufficient quantity to accommodate the people to be tested;

(2) Means for sealing and identifying specimen bottles;

(3) Chain of custody forms;

(4) A set of step-by-step instructions which describe the proper procedures to be followed during specimen collection, handling, and shipping; and

(5) Shipping materials.

(c) The marine employer shall ensure that specimens are promptly shipped to a certified testing laboratory meeting the requirements of § 16.340. Chain of custody documents must accompany each specimen from the time of specimen collection through shipment to and testing by the laboratory.

(d) Specimens shall be shipped by an expeditious means.

§ 16.340 Test laboratory requirements.

(a) The employer shall ensure that all chemical testing for dangerous drugs required by this part is conducted by a DHHS certified laboratory.

(b) The laboratory shall meet the requirements of 49 CFR Part 40.

§ 16.350 Specimen analysis.

(a) Each specimen shall be analyzed in accordance with 49 CFR 40.24, which requires testing for:

(1) Marijuana;

(2) Cocaine;

(3) Opiates;

(4) Phencyclidine (PCP); and

(5) Amphetimines.

(b) A specimen which indicates the presence of a dangerous drug at a level equal to or exceeding the levels established in 49 CFR 40.24 is reported to the Medical Review Officer as positive.

§ 16.360 Specimen analysis reports.

(a) The laboratory shall report all test results as required by 49 CFR 40.24(g). Reports are made within an average of five days after receipt of a specimen by the laboratory.

(b) The laboratory reports as negative all specimens which are negative on the initial test or negative on the confirmatory test. Only specimens confirmed positive are reported positive to the Medical Review Officer for a specific drug or drug metabolite.

§ 16.370 Medical review officer.

(a) The employer shall designate or appoint a Medical Review Officer (MRO) meeting the qualifications of 49 CFR 40.27. If the employer does not have a qualified individual ~~as~~ staff to serve as MRO, the employer may contract for the provision of MRO services as part of its drug testing program. (11/30/88)

(b) The MRO shall review and interpret each confirmed positive test result in accordance with 49 CFR 40.27.

(c) If the MRO verifies a laboratory confirmed positive report, the MRO shall report the positive test result to the employer or the employer's designated agent. (11/30/88)

(d) Before an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO shall determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work. In addition, the individual shall agree to be subject to increased, unannounced testing for a period as determined by the MRO of up to 60 months.

§ 16.380 Release of information.

(a) Except as provided for in this part and in § 4.06–60 of this chapter, an employer shall not release individual test results or other personal information for anti-drug program records.

(b) Individual results from drug tests required by this part may be released if the individual tested signs a specific authorization for the release of the results to an identified person.

(c) Nothing in this section shall prevent an individual tested under this part from obtaining the results of that test.

Subpart D—Employee Assistance Programs

§ 16.401 Employee Assistance Program (EAP).

The employer shall provide an Employee Assistance Program (EAP) for all crewmembers. The employer may establish the EAP as a part of its internal personnel services or the employer may contract with an entity that will provide EAP services to a crewmember. Each EAP must include education and training on drug use for crewmembers and the employer's supervisory personnel as provided below:

(a) *EAP education program:* Each EAP education program must include at least the following elements: display and distribution of informational material; display and distribution of a community service hot-line telephone number for crewmember assistance, and display and distribution of the employer's policy regarding drug and alcohol use in the workplace.

(b) *EAP training program:* An EAP training program must be conducted for the employer's crewmembers and supervisory personnel. The training program must include at least the following elements: the effects and consequences of drug and alcohol use on personal health, safety, and work environment; the manifestations and behavioral cues that may indicate drug and alcohol use and abuse; and documentation of training given to crewmembers and the employer's supervisory personnel. Supervisory personnel must receive at least 60 minutes of training.

November 14, 1988.

Clyde T. Lusk, Jr.,

Vice Admiral, U.S. Coast Guard Acting Commandant.

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